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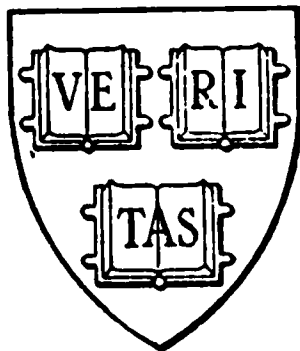
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**The Growth of Democracy**  
**in the**  
**United States.**



THE  
GROWTH OF DEMOCRACY

IN THE  
UNITED STATES

OR,  
THE EVOLUTION OF POPULAR CO-OPERATION IN  
GOVERNMENT AND ITS RESULTS.

BY  
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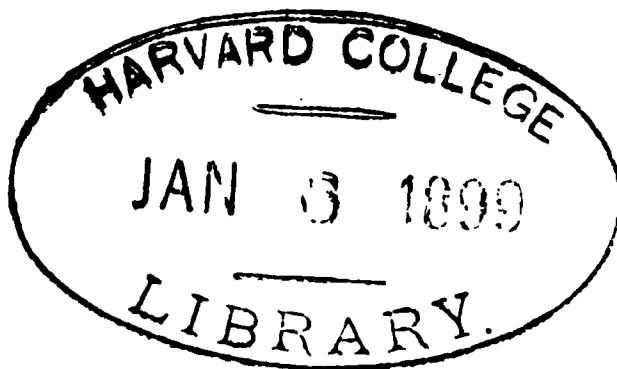
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**The People of the United States,**

THIS WORK IS GRATEFULLY DEDICATED.

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# PREFACE.

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For the observation of historical data, or the study of particular institutions, that point of view will be of greatest assistance in classification, will contribute most to an understanding of the relations of social and political phenomena, which allows of the broadest survey. This fact has long been recognized in the natural sciences. The student of botany, for example, endeavors to take a scientific point of view from which he can observe the phenomena of life in the particular plant which he is studying as related to all other plants and forms of life. Making his observations in this manner, the results of his investigation fall within the scope of a general science; his work becomes a contribution to the sum of existing knowledge within the biological field. If, however, he takes a standpoint which does not admit of broad survey, which will not readily permit the results of his labor to be used by those who are studying the life history of other plants, he will have done little to facilitate biological thought, or to give a better understanding of biological phenomena. In seeking for such a point of view for investigation in the social and political field one finds little guidance in the theoretical writings of the past. The many writers on these subjects have taken almost as many points of view; they have not yet reduced the subject to a common basis of inquiry. Recent writers on social subjects, however, are beginning to look for a common basis in biological and psychological law. It is conceived that the activities of man may be reduced to a science; and that the various social activities may be investigated from a common basis—the different social



sciences being differentiated only by the different interests which become the subject of inquiry; but while this has been the trend of modern thought, very little has as yet been accomplished in the way of putting political science on an evolutionary basis which would be common to the other social sciences. A recognition of this tendency, and of the desirability of viewing our institutions in their relation with other social and political movements has led me to venture on so broad a generalization as that contained in the first chapter following. It is urged in justification that it has afforded greater facility of thought on the relations of the political phenomena herein considered than any other that, so far, has been suggested. It may not stand the test of criticism, it may fall by reason of its failure to account for all the phenomena within the field of investigation; yet in the absence of an accepted method of procedure in this field, it is held out as an effort made in the direction of getting a point of view that may bring political history and law within the range of modern, social-scientific inquiry.

Among the reasons that may be urged for viewing political institutions from an evolutionary standpoint there are two which deserve special mention: (1) That which is can be best understood by considering that which has been; (2) that it is only by studying political life as a continuous process that we are enabled to determine relations of cause and effect. For the purposes of both the jurist and publicist an evolutionary study should conduce to the best results. The lawyer looks backward for the purpose of ascertaining what the established order is, and there his inquiry ends. The publicist looks backward for the purpose of viewing the established order as a means of determining the relations of cause and effect; he takes into account existing conditions; he observes the effects of a particular establishment working under these conditions; he holds in mind the ideals of the State as a

norm; he would know in what manner the law fails to secure the ends of the State. The publicist, relying on his knowledge of the experience of the past, projects for the present and the future; he would bring about such modifications in law and government as will best adapt them to the purposes of society.

As theories and conclusions are always hypothetical and more or less subject to error, such of these as are offered have been distinguished from the data upon which they are based; they are offered for what they may be worth.

With these considerations in mind the work in hand has arranged itself logically under the following divisions:

#### I. INTRODUCTORY CONSIDERATIONS.

- (1) The evolution of government prior to the period of American colonization.
- (2) The growth of government during the colonial period.

#### II. THE EVOLUTION OF PROVISIONS FOR POPULAR CO-OPERATION IN GOVERNMENT.

- (1) Co-operation by popular assembly.
- (2) Co-operation in representative democracy, or government by delegation.
  - (a) In the adoption and amendment of constitutions.
  - (b) In the election of governing agents.
  - (c) By petition, and the various forms of political activity guaranteed in the constitutions.
  - (d) In legislation and administration.

#### III. THE CAUSE OF THE GROWTH OF DEMOCRACY IN THE UNITED STATES, OR THE POLITICAL AND SOCIAL CONDITIONS WHICH HAVE OPERATED TO CHANGE THE ESTABLISHED ORDER.

#### IV. THE RESULTS OF POPULAR CO-OPERATION, OR MODIFICATIONS MADE TO THE END OF ADAPTING OUR INSTITUTIONS TO THE WELFARE OF THE PEOPLE.

- (1) Modifications relative to elections and appointments.
- (2) Modifications relative to the exercise of the functions of legislation and administration.
- (3) Modifications in the private law.

V. THE PROBLEMS OF TO-DAY, OR THE MODIFICATIONS OF LAW STILL NECESSARY TO BE MADE.

- (1) Problems arising from ordinary peace conditions.
- (2) Problems arising from the recent war.

VI. A CONSIDERATION OF THE DUTIES OF CITIZENSHIP UNDER FORMS OF POPULAR GOVERNMENT—CONCLUSION.

This opportunity is taken to acknowledge indebtedness to Prof. H. P. Judson for valuable suggestions and for the distinction in thought made between the "social state" and the "political state"—the social state being used as including all members of society who reside within the jurisdiction and under the protection of the government, the "political state" being used to mean all those politically organized people who have a right to exercise powers or co-operate in government, by election or otherwise.

To Professors Ernst Freund and Thorstein B. Veblen of the University of Chicago and Professor Frederick S. Turner of the University of Wisconsin I am especially indebted for valuable suggestions made in course of instruction and criticism. I wish also to acknowledge my obligation to Professors William Hill, A. C. Miller, J. Laurence Laughlin, F. W. Shepardson, Benjamin Terry, Edmund J. James and Edwin E. Sparks of the University of Chicago, James Riley Weaver of De Pauw University, Thomas W. Page of Randolph-Macon College, H. Parker Willis of Washington and Lee University, Mr. George Cushing Sikes of the Editorial Staff of the Chicago Record, and Mr. George G. Tunell, Ph. D. (Univ. of Chicago). I am also indebted to Miss Maude L. Radford, M. A. (Univ. of Chicago), and Miss Ellen Lee, A. B. (Univ. of Pacific), for valuable assistance rendered from time to time in the labor of preparation.

The subject in hand is one which has developed from a consideration of specific political topics. Some of the first essays thereon have appeared in the form of printed articles, addresses, seminar reports, etc. That part which treats of the evolution of laws relative to capital and labor may be found in almost the same terms in the "Yahrbuch der Internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre" of Berlin. Reflection on these several subjects found a common basis for thought in the broad thesis herein undertaken. While I am painfully aware of the fact that the theme is deserving of more able treatment, I trust that the labor involved in preparation may not be wholly lost to those interested in the facts of our political life.

F. A. C.

New Whatcom, Washington,  
October 1, 1898.



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# THE GROWTH OF DEMOCRACY.

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## CHAPTER I.

### THE EVOLUTION OF THE MODERN STATE.

In tracing the evolution of the state, the forces with which we have to deal are found in man—man controlled by certain wants, animated by certain desires, which he would satisfy. These wants and desires, largely the reflex of environment, furnish the mainspring of human activity, their satisfaction the end toward which all voluntary effort is directed. But, in directing his effort toward the satisfaction of desire an important qualification appears; he would obtain this satisfaction at the least possible cost to himself. In the prolonged struggle for satisfaction of desire, by a process of human selection and invention, operating under “the law of advantage,” or of greatest economy, social institutions have been evolved;<sup>1</sup> and any attempt to study government, without taking these motives into account would be futile. Nor can we

---

<sup>1</sup> There are those who account for the existence of the family upon the “law of advantage.” Lester F. Ward, for example, reasons that in human nature itself there are as many elements that would tend to drive men apart, cause them to destroy each other, as there are that would tend to bring them together; that human aggregation and the “social instinct” were the results of the greater advantage of co-operation. That this increased facility to meet the conditions of life is the evolutionary foundation for the family and of the larger social organisms. Herbert Spencer (*Sociology*, Vol. II, § 440), says: “So long as members of the group do not combine their energies to achieve some common end or ends, there is little to keep them together. They are prevented from separating only when the wants of each are better satisfied by uniting his efforts with those of others than they would be if he acted alone. Co-operation, then, is at once that which cannot exist without society and that for which a society exists.”



regard the evolution of popular co-operation in government in the United States as a separate movement. It is only a small part of a general process, a single link in a long chain of events.

Taking a general view of the historic development of government, from the standpoint of "the law of advantage," we find at the very inception two essentially different principles of organization. On the one hand may be found such institutions as the Village Community of India and the East, the agricultural and pastoral society of the south, the Township of the Teuton and the West, and among them examples of local self-government as complete and effective as those which are retained and jealously guarded by us to-day. As far back as history carries us, in India, in Russia, in Africa, in Germany and in England are found organized communities, holding their lands or other property in common as a brotherhood, dividing the occupation and the products of the soil by established law and custom, carrying on their industry and managing the affairs of the community in an orderly fashion by means of a popular assembly, a town council or representative head. The economic basis of this form of organization was industry—the cultivation of the soil, the tending of flocks and herds. The interests of such a community demanded orderly co-operation and equitable divisions of the products. The political system evolved was the social product of these interests.

On the other hand, another significant fact appears. Associated with self-government we find the principle of sovereignty. Its history is one of conquest. Animated by the same desire to satisfy their wants, the hill tribes organized their forces and sallied forth into the fertile plains of India, despoiling the agricultural communities and making the people slaves.<sup>2</sup> Here, then, in one so-

---

<sup>2</sup> The birth-place of the human family, it is thought, was in some tropical or semi-tropical portion of the earth where condi-

ciety we have both conqueror and conquered, master and slave, and with the new condition rise up new institutions based on the principles of conquest.

The purpose of industrial organization is to gain a mastery over nature and to make it subservient to the wants of man. Invention, industrial education, the arts, association and co-operation are all directed toward that end. The purpose or economic principle underlying the predatory organization has been to gain a mastery over

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tions for life were most favorable. Having no shelter, no implements, and possessing a low order of intelligence, the human could not survive a rigorous climate. Assuming that such was the case, it must have been much easier for the individuals living in tropical and highly productive parts to pick dates, cocoanuts, etc., than for them to pursue the chase or organize themselves into bands to fight for the goods which had been obtained by others. But as population increased it must have crowded on the natural supplies of the more highly productive parts. As a result the advantages of cultivation would be discovered, implements invented, and the less productive areas would be gradually brought within the range of habitation. By slow process of adaptation those places where the soil was well suited to a yield of fruit and grain would be devoted to cultivation, those regions where the soil was not readily responsive to agricultural labor, but which supported numbers of grazing animals, would be occupied by a pastoral group; and those regions in which neither of these conditions prevailed, which were rough and wooded and inhabited by wild birds and animals would be peopled by those who lived by the chase. It is highly probable that, from necessity, under all forms of employment, men sought to obtain the means of satisfying desire at the least possible expense of energy; that this not only accounts for early differentiation in the forms of activity, but also led to conflict. In many tribes the people are known to have followed a variety of employments; as, for example, the ancient Teutons or some of the North American Indians. It very commonly happened among these that the women and children would attend to such agriculture as they had and watch the herd, while the men pursued the chase. It is thought that it was through this form of industrial co-operation that the war organization was worked out. The men hunting in bands would come in conflict with hunters from other tribes, or coming upon a settlement possessed of the things desired by them, all of the men of the one tribe would organize a band for conquest, and the people of another tribe, together with their goods, would come to be regarded as a higher form of chase than the animals of the forest.

men—men as industrial agents—as a means of satisfying desire out of the labor and skill of others.<sup>3</sup>

The polity of the local industrial organization has been that of local self-government. Organized for the purpose of establishing an order of things most advantageous to the various members of the community in the exercise of their productive energies,<sup>4</sup> its primary aim has been harmony, co-operation, general weal. It has been democratic or representative—responsive to the public will. The polity established by the predatory organization has been that of military rule, monarchy, absolutism. Its aim has been the development of the greatest amount of fighting force, as a means of overcoming others and obtaining the products of their industry. It has assumed for the conqueror superiority, nobility, deification, sovereignty; it has assumed for the sovereign a primary right to the soil and absolute power over his subjects; it has reared up the fictions of the divine right of kings, hereditary succession, feudal tenure, eminent domain, monopoly, slavery.

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<sup>3</sup> "The history of the human race is one long story of attempts by certain persons and classes to obtain control of the power of the state so as to win earthly gratifications at the expense of others. \* \* \* \* The capital which, as we have seen, is the condition of all welfare on earth, the fortification of existence and the means of growth, is an object of cupidity. Some want to get it without paying the price of industry and economy. In ancient times they made use of force. They organized bands of robbers. They plundered laborers and merchants. Chief of all, however, they found that means of robbery which consisted in gaining control of the civil organization—the state—and using its poetry and romance as a glamour under cover of which they made robbery lawful. They developed high-spun theories of nationality, patriotism, and loyalty. They took all the rank, glory, power and prestige of the great civil organization and they took all the rights. They threw on others the burdens and the duties."

William Graham Sumner, in "What Social Classes Owe to Each Other," p. 101.

See also Cooley, Cons. Law, Ch. X, § 295

<sup>4</sup> To them and their purpose orderly and equitable co-operation was most advantageous.

It has been between these two forms of organization that the contest has been waged; the one having for its prime purpose the obtaining of satisfaction through industry, the other through conquest or spoliation; the one group seeking to establish a polity in aid of production, the other to build up a polity in aid of predation and as a guaranty to spoils.<sup>5</sup> Whether living apart in different tribes, or occupying the same territory under the same government the one subordinate to the other, the rule of might has always been the test of fitness to control and survive. That group has dominated, that polity been maintained, under which the people have been able to develop or foster the development of the greatest amount of material force, and amass and direct it toward a given end. For this local self-government did not make adequate provision; and isolated, localized industry was not the condition best adapted to success. The small isolated political community did not provide for the most economic production and its resources were not

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<sup>5</sup> Very commonly we find different individuals and different communities organized and acting according to the one principle at one time and the other principle at another. There are many examples of peoples who, acting as an industrial community, engaged in co-operative production during a part of the year, the summer, and as a predatory community during the other part, the winter. In such cases the form of organization employed for the productive activities was usually different from that employed for the predatory activities. After the conquest of a people the form of organization was usually changed in such a manner as to subordinate the captured to the captors and utilize them as slaves in industrial employment; then the industrial processes are conducted under a predatory regime and by force instead of by agreement and consent; the military forces control the government. It often happens that the same individual, at different times, in different relations, acts under both of these forms of organization. One may in his dealings of one kind act under an organization having co-operative production for its principle, and in his dealings of another kind act with an organization purely predatory, having for its object spoils. The Vikings furnish a striking example of this kind. So, too, we might say that the members of Tammany Hall present much the same aspect.

adequate for defense. The most profitable production can only be attained by a wide co-operation and division of labor. Extensive organization is as advantageous to economic production as it is necessary to successful warfare. We therefore find that localized industry and local self-government, in the struggle for supremacy, have uniformly succumbed to the broader organization of conquest. Primitive industry has been made a slave to the higher powers of absolutism.

Absolutism, however, is self-limiting. As its acquisitions have been made by force, its assumptions must be maintained by force. Its polity must be such as to secure to it the spoils of conquest. Territorial sovereignty must be maintained; to that end the domain is apportioned among the military leaders. The prime object being spoils, the conquered having been despoiled and enslaved, supremacy must be maintained as a means of further enjoyment—therefore the fictions of tenantry, serfdom, and slavery. But while the prowess of the predatory group of society must of necessity be greater than that of the localized industrial group which it has conquered, being parasitic in its nature, it cannot sap the life blood of the industrial body upon which it feeds without depleting its own forces. Absolutism unchecked will, in its very nature, destroy itself. The members of society must live and the resources of war be at hand. For the purposes of the predatory group, therefore, it becomes necessary both to foster industry, to allow it to grow strong, and at the same time to control it.<sup>6</sup> The limitations of absolutism are both from within and from without. From within it is limited by the economic necessities of the predatory group on the one hand, and by the danger of uprising among the in-

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<sup>6</sup> Owing to its economic advantage local self-government has often been retained as a primordial structure, but made subservient to the more general polity of conquest.

dustrial on the other; from without it is confronted by other predatory groups. It must maintain itself against all or succumb. These self-limiting qualities, by operation of the law of advantage, in the economic struggle, have broken down the fictions and assumptions of absolutism. The evolutionary result of the contest between these two groups has been the development of a broader and superior polity,<sup>7</sup> including the best principles of both and adapting them to the highest economic interests of society—a polity based on the general welfare.<sup>8</sup>

The struggle had been carried on many centuries before this broader and superior polity was evolved. In Asia, industrial progress had become paralyzed by absolutism; local self-government had become so stereotyped by custom and caste that the struggle of the industrial classes had almost ceased. At an early period the fictions of absolutism were woven around them till century after century rolled by and in humble subservience they labored, thinking that by submission they were doing the will of the gods. Religion, superstition and philosophy had been employed to lull the industrial peo-

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<sup>7</sup> The modern state is equally indebted to both the polity of conquest and of local industrial co-operation for its leading principles. To the first, the principle of sovereignty as found in the broader political organizations, to the latter the principles of self-government and co-operation based on consent.

<sup>8</sup> Knowledge of the miseries which have for countless ages been everywhere caused by the antagonisms of society must not prevent us from recognizing the all-important part these antagonisms have played in civilization. Shudder as we must at the cannibalism which all over the world in early days was the consequence of war—shrink as we may from the thoughts of those immolations of prisoners which have, tens of thousands of times, followed battles between wild tribes—read as we do with horror of the pyramids of heads and the whitening bones of slain people left by barbarian invaders—hate as we ought, the militant spirit which is even now among ourselves prompting base treacheries and brutal aggressions; we must not let our feelings blind us to the proofs that inter-social conflicts have furthered the development of social structures.—Spencer, *Prin. Soc.*, II (3d ed.), p. 231.

ple into quiet and fix upon them the blight of political and industrial servility. Here we find a most highly refined form of absolutism; a nation that can boast an ancient civilization, well cultured in learning and the arts, its rulers the recipients of the products of industry,<sup>9</sup> the people sober and industrious, their willing slaves. Al-

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<sup>9</sup> By the law of Mum taxes may be collected as follows:

1. A military king who takes even a fourth part of the crops of his realm at a time of urgent necessity, as of war or invasion, and protects his people to the utmost of his power, commits no sin. Mum., Ch. VII., p. 118.

2. The tax on the mercantile class, which in times of prosperity must be only a twelfth part of their crops and a fiftieth of their personal profits, may be an eighth of their crops in time of distress, or a sixth, which is the medium, or even a fourth in great public adversity; but a twentieth of their gains on money and other movables is the highest tax. Id., p. 120.

3. Serving men, artisans and mechanics, must assist by their labor, but at no time pay taxes. Id., 120.

4. Having ascertained the rules of purchase and sale, the length of the way, the expenses of food and of condiments, the charges of securing goods carried, and the net profits of trade, let the king oblige traders to pay taxes on their salable commodities: after full consideration let a king so levy those taxes continually in his dominions that both he and the merchant may receive a just compensation. Id., p. 127, 128.

5. Of grain an eighth part, a sixth or a twelfth as may be taken by the king. Laws of Mum, Ch. VII, 130.

6. Of cattle, of gems, of gold and silver added each year to the capital stock, a fiftieth part may be taken by the king. Id., 130.

7. He may also take a sixth part of the clear annual increase of trees, flesh, meat, honey, clarified butter, perfumes, medical substances, liquids, flowers, roots, and fruits, of gathered leaves, pot herbs, grass, utensils made of leather or cane, earthen pots, and all things made of stone. Id., p. 131.

8. Let the king order a mere trifle to be paid in the name of the annual tax by the meaner inhabitants of his realm who subsist by petty traffic. Id., 137.

9. By law handicrafts men, artificers and servile men, who support themselves by labor, the king may cause work to be done for a day each month. Id., 138.

At Smorbhulpoor, in 1766, when the natives relinquished the government to Great Britain, the rajah or king took one-fourth. Mill, Vol. I, p. 215, Note 1.

In Bengal, according to Dr. Buchanan, after taking out about  $5\frac{1}{4}$  per cent. for various purposes, and 10 per cent. for

though the institutions of caste and the fictions of absolutism formed an extraordinary protection to the ruling classes against dangers from within, the pessimism and despotism of the East so weakened their resources that they were impotent to protect themselves from dangers from without, and Asia became the field of conquest for the more sturdy and free nations of the West.<sup>10</sup>

Greece, at one time the patron of industry, had developed remarkable forces. But its rulers were conquerors averse to industrial engagement,<sup>11</sup> living by despoiling the conquered. With wealth came the blight of absolutism and of social effeminacy. With its population largely composed of impoverished freemen and slaves, its industry palsied and its people divided against themselves, Greece first fell prey to the greater military prowess of Macedonia, and later to the stronger powers of Rome.

But Rome, like Greece, was depleted by its own governors. Its resources were wasted; its industrial class was crushed by monopoly and misrule. It could not rally against the invasions of the Teutons. Rome fell a victim to its own weakness and the virility of the North.

However much the fall of the Roman Empire may be deplored it marks the advent of a new epoch. The su-

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the collection of revenue, as his part, the remainder of grain is divided between cultivator and king. Mill, p. 216. 1.

The exactions in India by way of tax rate under ancient law and custom may be understood by reference to the reports to the House of Commons in East India affairs. In some cases reported the government took such a large share of produce that it was necessary to return seed for the next year.

<sup>10</sup> Maine's Village Communities, p. 124.

<sup>11</sup> "The citizens who governed the state were generally a privileged and comparatively small class of the whole community. They enjoyed the franchises by right of birth or property: they were proprietors of the soil: according to the social habits of the ancient world they scorned manual labor as dishonorable and gave up all handicrafts and agriculture to their slaves. Jealous of their privileges, they excluded strangers and settlers from the franchise; and the slaves, who formed the entire work-



premacv of the military state was gone. Imperialism had been its own executioner; it had collapsed from self-indulgence. Absolutism had fallen prey to its own economic limitations. The great rubric of the Roman predatory state had fallen and out of its ruins arose a grander, a more powerful structure—the modern industrial state.<sup>12</sup> With the fall of Rome and the establishment of feudalism the lines of battle assumed a new front. The contest was now waged between castle and crown. During the Dark Ages, when lords and retainers were warring with each other and feudal barons were doing battle with kings, the industrial classes were gathering force which was destined finally to destroy both lord and monarch and to establish a government subservient to the interests of society at large. This stronger political organism had its germ in the mediæval city. The weakness of the monarch and the independence of the feudal lord were conditions favorable to its growth.

The fall of Rome left the empire in a state of anarchy. The monarch being weak, the people, either by their own seeking,<sup>13</sup> or by subjugation, fell under the protection and domination of the feudal lord. These lords, or barons, were free to plunder whom they would, except in so far as they were restrained by other lords or the association of armed citizens in the towns.

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class, were naturally denied any share of political power." I May's European Dem., 58.

<sup>12</sup> The phrase "industrial state" as here used signifies a social state organized politically with reference to the industrial welfare of its members.

"There is this essential difference between the spirit and life of ancient and modern communities, that the former were organized for war, the latter during their whole history have increasingly tended to be organized for industry, as their practical end and aim. The profound influence of these differing conditions on every form of human activity must never be overlooked or forgotten." Ingram, History of Pol. Econ. (N. Y. Ed. 1894) p. 9.

<sup>13</sup> That is by process of commendation or some similar arrangement.

The towns were of two kinds—those that had been established during the empire and had escaped destruction, and those which had grown up under the feudal regime. It was the former that first gained independence from the domination of feudalism. The Italian cities, richer and more populous than those in other lands, early became the centers of industry. Feeling the necessity of protecting themselves against invasion, they organized citizen militia, by means of which they were able to withstand the comparatively small military forces of the barons. The imperial structure having gone to decay, the government resolved itself into its primordial elements. The several towns that remained after the fall of the empire still held to the Roman model which, though not well suited to the government of a nation, was well adapted to local self-government.

All of their institutions were republican, founded upon popular election and public confidence. These institutions varied in different cities; but they were so far alike as to admit of a general description, more or less applicable to them all.

All citizens capable of bearing arms were summoned by the sound of the great bell of the city belfry. They assembled in the public place, where, following the tradition of the Roman republic, they elected two or more consuls every year, to administer justice within the city and to lead forth the trained forces to battle. This popular assembly, in very early times, acquired the name of Parliament. The municipal constitution of these cities was wholly republican. The consuls were assisted by a secret council, generally known as the *credenza*, and by a great council of the people or senate, consisting of one hundred citizens, both nominated by the Parliament. The smaller body administered the finances and superintended the public works, which still bear witness to the munificence, public spirit and taste of the Italian citizens of the tenth, eleventh and twelfth centuries. The popular council discussed the greater public affairs and pre-

pared laws for the ratification of the Parliament.<sup>14</sup> \* \*

Within their own cities they combined for the common good, and beyond their walls they were long able to resist the monarchs and feudal lords who coveted their wealth and were jealous of their greatness. By respect for the law and protection of property—almost unknown elsewhere—these cities advanced rapidly in population and prosperity. In the country no man was safe from robber-nobles; within the city walls law and order were maintained by the popular magistrates. The lawless violence of the powerful was restrained, and the lowly were protected. If the strong resisted the law, the magistrates were assisted by all the citizens of the republic in enforcing obedience and punishing the offender.<sup>15</sup>

In the twelfth century there were no less than two hundred of these free cities in Italy. In the absence of a broad military organization, these self-governing urban communities were able to protect the industrial welfare of their citizens and they attained a greatness in wealth and culture such as was unknown to other parts of the world. The merchants of Genoa, Pisa, Florence and Venice supplied Europe with the products of the Mediterranean and the East; the bankers of Lombardy instructed the world in the mysteries of finance and foreign exchange; Italian artificers taught the workmen of other countries the highest skill in the manufacture of steel, iron, bronze, silk, glass, porcelain and jewelry. Not only did the industrial and intellectual attainment of the cities give evidence of the superiority of their institutions, but, the feudal barons having been stayed, agriculture flourished within the radius of their influence.<sup>16</sup>

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<sup>14</sup> This was very similar to the early government of some of the New England colonies.

<sup>15</sup> May's "Democracy in Europe," Vol. I, p. 289.

<sup>16</sup> "So skillful was the agriculture of Lombardy and Tuscany that after a lapse of five centuries it is affirmed that the lands formerly comprised in the territories of these republics can be distinguished from those which continued under the sway of the feudal lords—the former being improved by embankments,

The beneficent results of the protection which the old Roman cities furnished to industrial organization, however, has not been confined to Italy. Progress toward the establishment of a polity favorable to the industrial welfare of society was made in other lands. In Spain and Portugal, as well as in Italy, the modified Roman city became the center of industrial freedom. In the fourteenth and fifteenth centuries the Spaniards and Portuguese led the world in the arts, in geographical discovery, in commercial adventure, in all that makes a nation great.

The other class of mediæval towns, those which grew up under feudal regime, though they accomplished the same political result after the fall of Rome, they had quite a different history. Generally speaking, the inhabitants were traders, artificers, villeins and serfs. Often these towns had their beginning as a small community of those who labored for their lord in the various occupations necessary for his pleasure, protection and well-being. They plied their trades in the interest of their masters or by sufferance, paying heavy tolls, fines, etc., for every privilege. These communities, however, were essential to the lord. The many petty chiefs warring with each other were as dependent on the tradesmen and serfs for sustenance and the means of carrying on war as the tradesmen and serfs were dependent on them for protection. It was not as if all political power was organized under and centered in one military head, as at Rome, but the thousands of smaller leaders, warring with each other and with the monarch, gave opportunity for the evolution of stronger organisms. The law of the survival of the fittest, acting among these many contending political organisms, made it necessary to use every re-

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irrigation, and the appliances of science and capital, the latter displaying the usual results of ignorance and neglect."—*Max*  
I, p. 292.

source to greatest advantage in order to survive. In the struggle that form of organization which provided the conditions for the development and maintenance of the greatest strength by the stern arbitrament of war was deemed fittest. This form made provision not only for the assertion of the greatest military force but also for the highest industrial welfare. The feudal organization provided for military protection; industrial freedom was obtained through a series of "freedoms"—i. e., licenses granted or practices allowed by those in control, whereby the industrial people were freed from exactions and allowed to conduct their own affairs by a system of local self-government, exercised under contract or by consent of baron or sovereign.

In England, for example, it would appear from the evidence at hand that the first form of freedoms were by sufferance, respect being had for custom. To usage were added certain specific grants in the nature of composition for tolls, fines and other forms of precarious tribute levied or exacted by the lord or sovereign; thus the privileges and liberties established by custom grew. The inhabitants having been, originally, "tenants or dependents of the king, or some particular nobleman on whose demesne they resided," their superiors had exacted from them not only rent for the lands but also various tolls and duties for goods made or exchanged. As attempts were often made at evasion, on the one hand, and oppressive exactions were resorted to in the collection of these tolls and duties, on the other, the inhabitants of the town were constrained to make a bargain by which they undertook to pay certain annual fees in lieu of the various other demands. These compositions having been found advantageous to both parties, they were continued and finally made perpetual.<sup>17</sup> After

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<sup>17</sup> See Kyd, Vol. I, p. 42-3, Ed. 1795. Various forms of license, on charter, to mediaeval towns are set forth by Gross

the composition of fines had been granted, certain political privileges, or "freedoms," such as the holding of courts, government by a representative council, etc., were gradually added. The government of the feudal town gradually assumed a local autonomous character under forms similar to the Italian free cities and the modern municipal corporation. But this local political organism became a part of the broader political whole to which it contributed a tax as compensation for the protection given against political forces from without.<sup>18</sup>

A second important feature, one that played a larger part in the life of the mediæval city, one to which we are largely indebted for our modern political institutions, was the gild (or guild). This was a voluntary and, at

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in his Gild Merchant. Typical among these, and one that he himself takes as a type is that of Ipswich, Eng., a part of which is as follows: "John by the grace of God King, etc., know ye that we have granted, and by our present charter confirmed, to our burgesses of Ipswich, our borough of Ipswich with all of its appurtenances and its liberties and free customs, to be held of us and our heirs by them, and their heirs hereditarily, paying annually at our Exchequer the right and customary ferm at Michaelmas term, by the hand of the provost of Ipswich and a hundred shillings of increment at the same term, which they were accustomed to pay. We have also granted to them that the Burgesses of Ipswich may be quit of toll and stallage, lastage, passage, pontage, and all other customs throughout our whole land, and in our seaports." (Gross, Vol. I, p. 7. See also appendix to Vol. I and the Charters set forth in Vol. II). In this the "freedoms" from various ancient forms of tribute and their commutation to an annual tax or duty is the principal element.

<sup>18</sup> Many of the European towns went so far as to throw off entirely the authority of the superiors, to raise up armies to defend themselves from foreign enemies and become a complete government within themselves. But this proved a failure. While they might by this means provide against the exaction of superiors they ignored one of the conditions of success in the struggle for existence. The advantage was always with those which had a broader organization, provided that the broader organization was not parasitic. It was only by alliance of the free cities that they could withstand the forces which pressed upon them. But alliance either led to internal contention or matured into a broader government. The struggle between nations was the condition which compelled the evolution of the broader polity, a polity which had regard for the welfare of its subjects.

first, private association among the industrial classes, having for its object the protection of the economic interests of its members—the merchants and craftsmen of the town and surrounding country. These voluntary associations gradually came to form a recognized part of the city government; and by license, either from the city council, the lord, or sovereign, they were allowed to control the industrial affairs of the city, provide trade regulations, etc. The organization of guilds and their ultimate incorporation into the city government practically placed the control of the municipality in the hands of the industrial people.<sup>19</sup>

Still another form of organization growing out of voluntary association might be mentioned in this relation, viz., that of the private corporation. This seems to have had its beginning and to owe its peculiar qualities to much the same course of events. In the general conflict between monarch and nobility, the communities, organized as towns, had obtained freedom from pillage or exaction, this license having been granted by king or baron in return for pledges of needed support or stipulated revenue. In the same manner the merchants or craftsmen had obtained license against interference with their trade, and finally had had certain privileges of regulation conferred upon them. Under these licenses, and the broader sovereignty which the monarch had been able to establish, the industrial organization broadened. Those who had theretofore fabricated their own articles, or cultivated their own produce, and then went into the market to exchange them, found it more advantageous to specialize, and the industrial community became differentiated in its functions. The guild organization followed the same course. Instead of there being one guild merchant, there came to be many craft guilds in a single

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<sup>19</sup> See Gross, "The Gild Merchant;" Von Maurer, "Stadtverf;" von Below, "Stadt gemeinde."

town, each having in mind the protection of particular interests. Still the industrial interests broadened, and it became advantageous to extend commercial and industrial operations so far that the guild associations could no longer serve the purpose. The private corporation seems to have been a product of this industrial growth. But in order to co-operate to advantage in this new relation it became necessary to procure freedom or license from those in control that the organization might not be hampered by exaction and damaging restriction. For example, a number of persons might wish to combine a certain part of their property for the purpose of mutual benefit and co-operative action. The most advantageous way of treating this property would be as a common fund. If, however, a part of the property were land it was subject to the feudal burdens of wardship, escheat, relief, non-entry, military service, etc., which if the land were held by a corporate body would be lost to the sovereign. In England an adjustment seems to have been made under the form of a "license in mort main." By this device the "captains of industry" were enabled to relieve themselves from these feudal burdens and disabilities, and the king to swell his revenues by composition in a fixed sum. In other words, the prospective revenues to be derived by the crown from the "feudal casualties" were commuted to a fixed sum agreed upon by the parties. This was one of the means by which revenue was procured by the crown and a license for broader and more advantageous organization was obtained by the industrial body.<sup>20</sup> The result was the breaking down of a certain part of the feudal regime in the interest of the general welfare.

Through these various forms of organization the mod-

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<sup>20</sup> In other parts of Europe the process took on another form and name but the organization seems to have had the same economic basis.



ern state seems to have risen. By freedom from pillage and exaction, secured to the municipality, the conditions were present for profitable production; by freedom from restraint secured to the guilds, co-operation was enlarged; by freedom from certain feudal burdens, and grants of advantage, secured to the private corporation, the industrial organization reached out till it became coterminous with the jurisdiction of the sovereign. These forms of organization, based on contract (or compact),<sup>21</sup> may be regarded as a new foundation for the state. The whole social and political system became shifted from one of conquest and force to one of contract and consent. Then, also, it was through these various forms of co-operative action that the people learned to govern themselves. It is in these "communities of interest" that the principle of representation took its root and expanded until it came to include the broad political community. As the community of interest broadens and extends beyond the political jurisdiction of the state there is a tendency to enlarge the political organization in order that the economic interests of the people may be better protected. The modern state is a cloak which is put on by the industrial organization. The foundation is industrial, the superstructure in part political. In the ancient state, founded upon conquest, this was not the case. The Middle Ages was the period of transformation.

But we have so far portrayed only one side of the evolution—the condition of broader industrial organization as a basis for the modern state. The contest between the different forms of political organization, and the evolution of a broader sovereignty, furnishes an interesting

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<sup>21</sup> These contracts were in the nature of agreements, tacit or express, between the various industrial associations and the crown or other agent of the government. The charter, the license, the "ancient liberty," were some of the forms in which they appear.

chapter. During the feudal reign, when the principle of monarchy was not well established, the forces of the isolated barons had been too weak either to overcome the free cities or obtain a permanent mastery over large territories. The contest between barons and monarch, which had been a condition favorable to the growth of the industrial organization, was gradually decided in favor of the latter; the cities by mutual concession were enlisted under his banners and the feudal barons were ultimately crushed. But the amassing of forces in the hands of a single sovereign well-nigh proved fatal. By accident of birth Charles V. of Spain became the rightful heir to the principal thrones of Europe. This circumstance brought under his command such military forces that he was enabled to arbitrarily override the ancient rights and privileges of cities, provinces and states. Says May,<sup>22</sup> commenting on the reign of Charles:

No monarchy of Europe had once been more free than that of Spain. In Castile and Aragon, and other Spanish kingdoms, the prerogative of the crown had been usually limited; and the Cortes were bold and independent Parliaments. In Catalonia the people had deposed their sovereign, John II., and his posterity, as unworthy of the throne, and endeavored to establish a republic. In Castile the nobles had deposed their king, Henry IV., with the general assent of the people. In Aragon the kings were originally elective; and it was an article of the constitution that if a king should violate the rights of the people it was lawful to dethrone him and elect another in his place.<sup>23</sup> The representatives of the cities held an important place in the Cortes, without whose consent no tax could be imposed, no war declared, nor peace concluded. The institutions of Castile were no less popular; and in the Castilian Cortes, as in the English Parliament, it was an ancient custom to postpone the granting of

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<sup>22</sup> May's Democracy in Europe, Vol. II, p. 28.

<sup>23</sup> This is the doctrine of impeachment as employed by us relative to our chief executive and which has been acted upon in England in the deposition of kings.

supplies to the Crown, until grievances had been redressed and other business affecting the public welfare concluded.<sup>24</sup> Throughout Spain the cities had attained extraordinary social influence and political power. The nobles being exempt from taxation, it was to the cities that the kings were forced to apply for pecuniary aid; while they (the kings) were ready to grant privileges and immunities in return.

But Castile had been debauched by the treacherous King Henry,<sup>25</sup> the predecessor of Isabella; other provinces had been torn by the intrigues of nobility and the profligacy of their monarchs. By the marriage of Ferdinand and Isabella, Castile and Aragon were joined; and in war the other hostile provinces were settled under their rule. Urged on by the religious fanaticism of the age, this power, concentrated in their hands, instead of being used to restore conditions of peace and profitable industry, was turned to a destructive crusade against all who would not acknowledge the established church. The murderous inquisition brought many high-minded and patriotic citizens to the block. The religious wars wasted the lives and resources of the people, the expulsion of the Jews and Moors, deprived the state of some 800,000 of its most intelligent and industrious citizens. Under Charles V. (First of Spain) grandson of Isabella, the political jurisdiction of the empire was widened so as

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<sup>24</sup> This was a check on the royal prerogative, maintained by the people through their various local organizations and their representatives in the House of Commons that finally remoulded the Constitution permanently limiting and prescribing the powers of the crown and establishing a form of government based on the welfare of the people.

<sup>25</sup> "The character of Henry the Fourth has been sufficiently delineated; dismembered by faction, her revenues squandered on worthless parasites, the grossest violations of justice unredressed, public faith became a jest, the treasury bankrupt, the court a brothel, and private morals too loose and audacious to seek even the veil of hypocrisy. Never had the fortunes of the Kingdom (Castile) reached so low an ebb since the great Saracen invasion." Prescott's *Ferdinand and Isabella*, Vol. I, p. 138. (N. Y. Ed., 1873).

to include half of civilized Europe. This circumstance strengthened the hand of absolutism. Inquisition and military force were the instruments by which Charles reduced his subjects to submission and wrung from them their political rights and privileges. Though met by resistance, the military power of the combined states proved all too powerful. One after another, the cities and provinces were crushed and the people reduced to servility. Absolutism reached out till at last it came in conflict with the free cities of the Netherlands. For a time it seemed that these too would fall within its destroying power. Never since the fall of Rome had industrial liberty been more seriously threatened. The polity of conquest and military rule under the broad organization of Charles had asserted itself with such force that the smaller organisms of the south could not resist.

In the Netherlands, however, Charles met with a more sturdy people—a people, well organized and well trained in the management of their political and industrial affairs, whose resources had not been depleted by a parasitic nobility. For decades they resisted the army of Charles and later of Philip. This was a contest in which the two forms of political organization were put to a test. On the one hand was absolutism, by arbitrary rule sapping the resources of the people under its control. On the other was the polity of self-government and industrial co-operation. The one found Italy, Spain and Portugal the industrial center of the world. The local autonomy of their institutions was denied; the spirit of self-government was crushed; industry was discouraged; the people were murdered, pillaged and expatriated. The powerful resources which absolutism had found at hand were wasted and the empire depleted. The other found itself beset by a superior army. The Dutch free cities, single-handed, were, at first, no match for Charles, and had the latter maintained his resources at home they


must ultimately have given way. But the superior forces from without compelled broader organization within; the confederation of the Dutch provinces in the Pacification of Ghent (1576) and the union of Utrecht (1579) was the result. By union they placed themselves in a condition to resist invasion, and industry, undisturbed by forces from without, under a regime of self-government, not only sustained their armies in the field but at the same time added to the material wealth of the people.

Throughout these trials, the sturdy citizens, masters of the sea, and trained to commerce and maritime enterprise, had extended their ventures far and wide, and had grown in wealth and lucrative industry. The population was recruited by immigration from the less favored provinces. They had no democratic theories or sentiments, but in resisting tyranny they had become, by force of circumstances, a republic; and their robust spirit of freedom displayed itself in all the acts of the commonwealth. While the despotic Philip (the successor of Charles V.) with all his vast possessions was starving his soldiers and repudiating his debts, this brave little citizen-state was bringing model armies into the field, was sending forth its fleets to victory and its merchant ships to discover new realms and to trade with the whole world. It was helping the Protestant cause in France with men and money, and was speeding its blunt, outspoken envoys to the French king and English queen to combat, with truth and earnestness, the artful diplomacy of crowned heads. \* \* \* Far different was the lot of the ill-fated provinces still in the grasp of the tyrant. The land lay waste and desolate; its inhabitants had fled to England or Holland or were reduced to want and beggary.

Absolutism was at length forced to make peace with industrialism. The peace of Westphalia (1648) recognizing the independence of the Dutch Republic marks an important epoch in the history of the industrial state. Absolute power had been successfully resisted. The right of

a people to revolt against oppression had been recognized by crowned heads. The free Dutch cities, with their remarkable resources developed under an industrial polity, by confederation and wider co-operation had compelled the recognition of the principle of the general welfare as the basis of government. In the evolution of government the industrial state had demonstrated its fitness to survive. Soon after the Dutch Republic—a victim to the dissensions of its own military leaders under a regime of predation—began to decline; but the advantages gained by the conflict were not lost to the world. It had stopped the onward progress of imperialism; had broken the march of organized absolutism. After a century and a half of heroic struggle this small industrial republic compelled the recognition of its independence. While the Dutch Republic later fell a prey to the dissensions of its own people and the predatory instincts of its military rulers, the powers of absolutism had been so wasted in the contest that the evolution went on. Thereafter we find the highest forms of political life in that other industrial nation that had combined with the Dutch in resisting the encroachments of the empire—in England.

There, as in Holland, the environment was especially adapted to the development and final supremacy of an industrial polity. Nature had especially equipped her for the home a maritime and industrial people. Her insular condition, the peculiar indentures of her coast, her geographical position, fitted her for extensive commercial intercourse with other nations. While nature was here less lavish and therefore less favorable to idle luxury, the soil was fertile and responded liberally to the skillful touch of the husbandman. Her mineral wealth, greater than that of any other land of equal extent, lay deeply buried in the earth, encouraging, in fact compelling, a life of hardship and risk. The fruits of labor gained at such a cost would not be yielded up without a



struggle. Though the victims of Roman, Pict, Angle and Saxon, Dane and Norman, through all the vicissitudes of conquest, the sturdy industrial people of the British Isles retained their local industrial polity.

With the advent of the Normans the general government of England was organized on a predatory basis. Its polity was the polity of conquest, having the character of absolutism. The Conqueror, having overrun the island with his military bands, had apportioned the soil among his colleagues or retained it for his own use. The chief maxim of government was: "The King is the source of all power and the fountain-head of justice." The government was made up of conquerors, or those in whom special privileges were conferred by the King. Such fictions as: "The King can do no wrong," divine right, absolute sovereignty and hereditary succession were among the legal notions and political concepts that had been established by rule of might for the perpetuation of special privileges gained in conquest.

But the forces of absolutism were at once divided between two estates.<sup>26</sup> The land and local jurisdictions having been apportioned among the military leaders, the interests of lords and king were opposed. A contest for authority ensued, and out of this contest a third estate arose. This third estate was from among the industrial classes. There, as on the continent, both parties found it necessary to have the resources of war and means of sustenance at hand. Both found it advantageous to protect the industrial group. While the industrial community, organized in the cities and on the manor under systems of local self-government, were being fostered by lord and king, the people were being trained to wield the

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<sup>26</sup> "Estate" is not used in the same sense in English history as in French. In England it is used rather to signify class. But this term being in common use it is retained here for convenience.

powers of state in their own behalf. The industrial leaders, having control of the material resources of the nation were enabled to impose limitations on both Lords and Crown.

Prior to 1688 the Crown was constitutionally the dominant estate. Many were the contests that had been waged for the enlargement of the powers of the other two and the protection of their interests. Many were the struggles for a polity of equity and social well-being, and each time those who had thus asserted themselves had been either crushed by the weight of organized absolutism or, manifesting superior strength, had gained from the dominant estate solemn promises and charter grants which had been as often violated, when circumstances favored. Royal oaths proved to be only royal lies. And solemn grants were made the cause for royal vengeance.<sup>27</sup> In fact, the Crown was so powerful that England can scarcely be said to have had a constitution except such as abided in the will and act of the sovereign or in the people in revolution.

By the establishment of 1688 the powers of government were divided among the three estates—Crown, Lords and Commons.<sup>28</sup> The powers and prerogatives of

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<sup>27</sup> Among the charter grants and royal promises violated by the crown we may name the following: The charter of liberties, the two charters of Stephen, the charter of Henry II, the constitutions of Clarendon, the Magna Charter, the provisions of Oxford, the provisions of Westminster, the statute of Marlborough, the statute of Westminster, the confirmation of charters, and the Habeas Corpus Act.

<sup>28</sup> The commons were those leaders in the industrial field who, though not a part of the governing class under the old regime—having no title, and no relation with the crown except that of subject—had won for themselves a place by virtue of their having control over the industrial resources. Under the various forms of license and local privilege, they held the purse strings of the nation. In any attempt to raise revenue it was necessary to consult them. The House of Commons was first called together for this purpose. But before these revenues were granted certain grievances must be redressed. Thus they gradually came to take part in legislation and finally came to have



the Crown were reduced and those of the Lords and Commons increased. The exercise of the sovereign functions was so apportioned among them that each estate became a constitutional check upon the other. Thereafter no one estate was strong enough to subvert the whole system in its own interest. The King controlled the Peers by his power of creation, whereby he might at any time dictate their action. The Peers and King nominated a majority of the House of Commons and the Commons controlled the King by having the initiative in appropriations to sustain the government. This was a great step toward building up a system of modern constitutional government. The necessity for settled principles of organization, of an established plan such as would protect the rights of the estates, curbed the absolutism of the Crown and compelled the other estates to compromise their powers.

But the constitution of 1688 fell far short of government for the governed. It was still predatory in its purpose and organization. It ignored the great fourth estate—the common people. It was not based on the principle of the welfare of the nation at large, but on the welfare of the three ruling estates. It was not a responsible government.

The country had no constitutional control over the monarch nor over the House of Lords. It had not even a control over the House of Commons, although it was a house supposed to be representative of the nation. It was nominated, or at least a majority of its members were nominated, by the nobility. This was done openly, and the practice continued down to 1832. The country had no control over its meetings or its parting. The King could summon it when he pleased and dismiss it

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a recognized place in the government. Through the municipality, the guild, the private corporation, the interests of the leaders of industrial enterprise reached the general government in the House of Commons.

when he pleased. No pressure of public business, no public want, no emergency could give the people any voice in the business. Even when the House of Commons met, the public had no control over the members. They could not recall them; they cannot do it even yet. They had to wait for three years and then for seven years before they could even change the members—that is, in the few cases in which the constituencies, such as they were, had the power to do so. Then for many long years the country had no opportunity of knowing what their representatives were doing. The debates and votes of the House of Commons were not allowed to be published. It was not till 1770 that the publication of proceedings of Parliament was allowed. Meanwhile the members of the House of Commons, partly from the blandishments of royalty, partly from the bribes of ministers and partly from their anomalous and irresponsible position, were a separate caste and no true representatives of the people at all.<sup>29</sup>

The government was still a close corporation.<sup>30</sup>

The spirit of self-interest which had dictated to the Crown a recognition of the Lords and Commons, which had in revolution established a constitution based on the equality of these three estates—an order of things in which none could obtain the mastery—demanded as to all others a polity of conquest, of inequality, of absolutism. This appears not only in the attitude of the government toward the common people but also in its colonial policy. England's colonial polity was predatory. An imperial polity based on the general welfare of all parts of the imperial realm had not yet been evolved.

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<sup>29</sup> Murdock, *A History of Constitutional Reform*, pp. 28.

<sup>30</sup> "In case it may be supposed that there is exaggeration in the indictment against the three estates under the new constitution," says Murdock further, (*Constitutional Reform*, pp. 26) "it may be interesting, and perhaps profitable, to look into the Statute book and see how these early legislators spent their time after their inauguration into office." The author here sets out a long list of statutes adverse to the interests of the com-

It was not till after the Canadian revolt of 1837, after England had lost the thirteen colonies, and had a second colonial revolution on her hands, that the government was awakened to the necessity of a colonial polity based on the welfare of the colonies. The ideal of empire was that of making the conquered or annexed portions subservient to the central or conquering people. In America the King indulged the fiction that, by virtue of a few voyages made by English sailors and adventurers, he be-

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mon people and favorable to the ruling estates. Continuing, he says:

"Legislation of the above character began now (1810) to cease, as it was apparent that the country would not submit further. It had, indeed, gone very far—so far as to make the life of the workingmen of the country one of legalized oppression. The specimens given are not all, nor nearly all, for it was in the administration of the laws where the despotism was chiefly felt. This was done in a pitiless manner. It was not uncommon to have a sentence of death pronounced for an offence which is now petty larceny. The punishments, especially for offences against property, were fearful, and the state of the prisons was enough to make one shudder. The number of taxes, too, and their vexatious character, bore with great severity on the masses of the people. Indeed it would seem to have been the delight of Parliament after Parliament from 1688 to 1810, to do little else than sit, and raise and spend money, carry on war, and execute their cruel laws with all possible severity.

"All this time there was no check on these estates of the realm. On a review of the legislation over the period from 1688 to 1810 it would appear that there was a system of property being created, and a monopoly of government being produced, which gave tremendous power and tremendous wealth to a class—that class the aristocracy, the old nobility, and those that elbowed themselves up to position. Of course there were the other two estates to be consulted and carried along with them. There was the monarch. He had to be largely subsidized; and when it came to the time of the prince-regent it was not easy subsidizing him. Then the Commons—at least a majority, and certainly the most prominent of them—had to be bribed. The corruption that was systematically carried on was on a large scale; it was not hidden but openly paraded and freely avowed and it was, times without number, charged against the ministry, in the House of Commons, without contradiction and without complaint. \* \* \* The subsidizing of the monarch and the corruption of the Commons was the quid pro quo paid by the aristocracy for the constitutional privilege of plundering the nation."

came the owner and the Crown of England the rightful sovereign over a large part of the western continent. The Indians and all other inhabitants were regarded as holding this territory, not by first right, but by sufferance or a right of occupancy only.

Why this assumption? Why its maintenance by an armed force? What is its economic advantage? The alert, self-centered Englishman had learned of this vast western continent, its probable riches, its wide expanse, its primitive people. To him it was a new field to be exploited. That this end might be accomplished without interference on the part of his neighbors it became desirable to throw over it the mantle of British sovereignty. This assumption having been established, or being granted, it then became competent for the King, by his ipse dixit, to apportion the soil to his subjects, to grant special privileges and to delegate to others the exercise of sovereign rights.<sup>31</sup>

The powers of state, passing to the hands of the three estates, were still used to further the interests of the governors. At home the three estates governing, as between themselves each interest served as a check on each other interest; but abroad, in dealing with people whose organized forces were too weak to resist, that overpowering desire for satisfaction which had served as a safeguard to industrial interests in England became a

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<sup>31</sup> What more significant comment on England's foreign policy than the opening lines of Mill's great work? (*The History of British India*, Vol. I, p. 1). With all the proverbial pride of an Englishman he announces: "Two centuries have elapsed since a few British merchants humbly solicited permission of the Indian princes to traffic in their dominions. The British power at the present time embraces nearly the whole of that vast region which extends from Cape Comorin to the Mountains of Thibet and from the mouths of the Brahmapootra to the Indus." These two vain-glorious sentences mark the beginning and the end of the history of one of the most perfidious conquests, in the interests of corporate commercialism, that the world has ever known.

motive of oppression. The rights and properties of others were regarded as legitimate prey, and all of the energies of the state were used to further the interests of grasping commercialism.<sup>32</sup>

Such were the first assumptions of colonial government. At the time of the colonization of America absolutism was making its last struggle for political supremacy. The Dutch colony of New York was planted during the twelve years' truce; nearly all of the colonies were founded prior to the peace of Westphalia; the principle of the separation of powers was not established in England till 1688. We may, therefore, expect to find the fictions of absolutism involved in the settlements. Some dreamed of gold, others of states and empires. The Crown would make the western world a royal fief; those who would attain their ends by commerce and industry sought corporate charters and monopolies; those who sought to satisfy their desires through the exercise of functions of government would be made lords proprietary "with free, full and absolute power \* \* \* to ordayne, make and enact \* \* \* any laws whatsoever," hold courts, collect revenues, etc.

But attempts to transplant these ideas to American soil proved more difficult than had been anticipated; there was nothing here to sustain them. The natural resources were undeveloped; there was no industrial class

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<sup>32</sup> A long list of events might be referred to as the result of this attitude. One of the events of the present century illustrative of this spirit is the "opium war."

See McCarthy's *History of Our Own Times*, Vol. I, p. 116, et seq. (Armstrong Ed.); Callery and Yoan, *History of the Insurrection in China*. Ed. 1853, p. 15, et seq.

It is not suggested that the conduct of England toward weaker nations and her own colonies has been more reprehensible than that of other powers during the same period. On the other hand the illustration is used only as a means of setting forth the practice of the foremost of powers in the evolution of government.

upon which to feed; such assumptions of absolutism could not be maintained in an untamed wilderness. All of the early attempts at colonization, therefore, came to naught. The governing classes were compelled to adopt a form of political organization for the colonies which was favorable to the industrial welfare of the colonists and to discard their highly wrought ideals of control. From the nature of things the purpose of colonization became industrial; the conditions of life in the new world were industrial; the spirit of the times was industrial. The environment of society in America was such that none other than an Industrial State—a state based on the general welfare—could live.

Had absolutism maintained its assumptions there could have been no British colonial system. Had the English government later been able to play the part of the imperial master the history of the British Empire would doubtless have been quite similar to that of Greece and Rome.

The basis of American colonization being industrial, the colonists, taking on an industrial polity, claiming the right of self-government under the constitution of England, as Englishmen, in revolution against these assumptions they won for themselves political freedom; they established an imperial polity upon the principle of the public welfare. This is the service which the United States of America has rendered to the world.<sup>33</sup> This was its contribution to the evolution of the modern state.

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<sup>33</sup> In the evolution of this "imperial policy based on the principle of the general welfare," since its establishment in 1887 the European nations have in some respects gone further than our own government. Subsequent to the reform acts of England, the revolutionary period of 1848-9 and the German Federation we have found many of our models of reform in those nations which still retain, in form, a monarchical system. In fact, they have in some particulars, become more democratic, more highly responsive to the public will and more efficient in administration than others of republican form.

The principle of sovereignty, at first imposed by the conqueror as a fiction necessary to the enjoyment of the spoils of conquest and the privileges established by force, still lives. Wrested from the hands of the despot, the monarch, the military chief, it is now an instrument of economic achievement in the hands of the people. In the evolution of political institutions a broad co-operative policy, based on the general welfare, has obtained the mastery. Strengthened by antagonism, forced into broader and more powerful organization, passing successively through the form of the local or village community, the municipality, the state, it has assumed control of empires and we may look forward with hope to the time when the whole world will be organized under one economic system.<sup>34</sup> The polity of conquest is on the wane. In some of the states it is still the dominant force; but, being parasitic in its nature, both the state employing it and the polity itself are doomed to extermination. Many of its fictions still remain in the modern state, but, in so far as they are opposed to the general welfare, they too must go. The political problems of to-day have to do largely with their elimination. Having traced, very briefly, the evolution of the modern state, we now turn our attention to the historic precedents of popular, co-operative government in the American colonies.

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<sup>34</sup> "Dislikes to governments of certain kinds must not prevent us from seeing their fitnesses to their circumstances. Though, rejecting the common idea of glory, and declining to join soldiers and school boys in applying the epithet 'great' to conquering despots—we detest despotism—though we regard the sacrifices of their own peoples and of alien peoples in pursuit of universal dominion as gigantic crimes, we must yet recognize the benefits occasionally arising from the consolidations they achieve. \* \* \* Not simply do we see that in the competition among individuals of the same kind, survival of the fittest has from the beginning furthered production of a higher type; but we see that to the unceasing warfare between species is mainly due both growth and organization. Without universal conflict there would have been no development of the

active powers. \* \* \* Similarly with social organisms. We must recognize the truth that the struggles for existence between societies have been the instrument to their evolution. Neither the consolidation and the reconsolidation of small groups into large ones; nor the organization of such compound and doubly compound groups; nor the concomitant developments of those aids to a higher life which civilization has brought; would have been possible without inter-tribal and inter-national conflicts. Social co-operation is initiated by joint defence and offence; and from the co-operation thus initiated all kinds of co-operation have arisen. Inconceivable as have been the horrors caused by this universal antagonism which, beginning with the chronic hostilities of small hordes tens of thousands of years ago, has ended in the occasional vast battles of immense nations, we must nevertheless admit that without it the world would still have been inhabited only by men of feeble types, sheltering in caves and living on wild food."—Spencer, *Prin. Soc.*, II, pp. 231, 240, 241.



## CHAPTER II.

## THE EVOLUTION OF GOVERNMENT IN THE COLONIES.

In the year 1496 John Cabot sailed along the eastern coast of North America from Newfoundland south to the thirty-eighth degree north latitude, by virtue of which fact Henry VII. assumed to be the rightful owner not only of the territory actually viewed by this royally commissioned navigator but also of all that territory lying to the west and the islands near the eastern shore. The Indians and all other inhabitants were thereafter regarded as holding the soil and exercising the functions of government subject to his sovereignty,<sup>35</sup> having only rights of occupancy and use<sup>36</sup> subordinate to the title of the King. Upon this foundation, this fiction of absolutism, all subsequent governmental structures in America were built.<sup>37</sup>

Not only was the foundation for American colonization an assumption of absolutism, but the first institutions erected thereon were also of similar nature and origin. The first charters granted by the Crown belonged to the institutions of feudalism and conquest—were in the nature of fiefs. The grantees of the charters to John Cabot (1497) and Hugh Eliot (1502) were empowered to subdue and possess the territories discovered as the vassals and lieutenants of the King.<sup>38</sup> By the

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<sup>35</sup> Story on the Cons., Sec. 6.

<sup>36</sup> Story on the Cons., Sec. 7. See *Johnson v. McIntosh*, 8 Wheat, 543.

<sup>37</sup> Story on the Cons., Sec. 2.

<sup>38</sup> H. L. Osgood, *Am. Hist. Rev.*, Vol. II, p. 647.

charters granted to Sir Humphrey Gilbert (1578) and Sir Walter Raleigh (1584) attempts were made to erect in the western wilderness that form of fief known as a palatinate. But the fief, as a form of political organization under which to establish a colony, proved a failure. Four charters had been granted and two attempts made at colonization under them to no effect other than to firmly fix and gain recognition for the primary assumption of sovereignty.

The seventeenth century ushered in a new series of attempts at colonization. The first was one in which the King retained to himself the exercise of all the regalities and sovereignties. Instead of granting governmental powers to a lord and allowing him to organize a palatinate, he granted to persons desirous of exploiting the new continent a right to settle on certain parts of the royal domain. By the first charter of Virginia (1606) no governmental powers whatever were extended to the grantees.<sup>39</sup> So far as they were concerned they were only permitted to hold land of the King under his arbitrary assumption of ownership. The form of government was that of a royal province (or, we might say, a palatinate over which the King himself was the lord), having its directive machinery in England. The Royal Council of Virginia was the creature of the King, as were also, indirectly, the councils, designed for each of the colonies to be sent out, which were to reside in America. The patentees who interested themselves in "the first colony" (Virginia) succeeded in maintaining a weak and dwindling settlement till a change in organization was effected; but the patentees who interested themselves in "the second colony" (New England) made only one settlement, Sagadahoc, and that entirely disappeared. It became evident to all concerned that a body

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<sup>39</sup> H. L. Osgood, *Pol. Sci. Quart.*, Vol. XI, p. 206.

of men who were accustomed to the exercise of arbitrary power, who resided thousands of miles from the colony, and who knew little or nothing of prevailing conditions could not successfully govern. Failure stamps the second form of experiment in colonization.

That the interests of the colonists might be better conserved, another form of organization was now employed. The trading company was taken as a model, incorporated, and given certain political powers for orderly conduct of affairs. The essay was made in 1609, when the first charter of Virginia was supplanted by the second.<sup>40</sup>

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<sup>40</sup> The charter of 1609 recites that "whereas at the humble Suit and Request of sundry our loving and well disposed Subjects, intending to deduce a colony, and to make Habitation and Plantation of sundry our People in that part of America, commonly called Virginia. \* \* \* Now, for as much as divers and sundry of our loving Subjects \* \* \* have of late been humble Suitors unto Us, that (in Respect of their great Charges and the Adventure of many of their Lives, which they have hazarded in the said Discovery and Plantation of said Country) We would be pleased to grant them a further Enlargement and Explanation of said Grant, Privileges and Liberties, and that such Councillors, and other Officers, may be appointed amongst them, to manage and direct their Affairs, \* \* \* We greatly effecting the effectual Prosecution and happy success of said Plantation, and commending their good desires therein, for their further Encouragement \* \* \* do of our special Grace \* \* \* Give, Grant, and Confirm, to our trusty and beloved Subjects (naming about six hundred fifty persons beside over fifty liveried companies interested) and to such and so many as they do, or shall hereafter admit to be joined with them \* \* \* whether they go in their Persons to be Planters there in the said Plantation, or whether they go not, but adventure their monies, goods or Chattels, that they shall be one Body or Commonalty perpetual, (providing for the ordinary powers of a private corporation) \* \* \* And forasmuch as it shall be necessary for all such our loving Subjects as shall inhabit within said Precincts of Virginia aforesaid, to determine to live together in the fear and true Worship of Almighty God, Christian Peace, and Civil Quietness each with other, whereby everyone may with more Safety, Pleasure, and Profit enjoy that whereunto they shall attain with great Pain and Peril," full political powers are granted to elect officers, provide the proper forms and ceremonies of office, "to correct, punish, pardon, govern and rule," all subjects within the territory granted or going to and from the same, to suppress rebellion, exercise martial law, etc. See Poore's Charters, p. 1893, et seq.

The essential change was that of placing the full control and management of affairs in the hands of those materially interested in the success of the enterprise. It became now a matter of business. Here was a company that had obtained a tract of land about four hundred miles wide and extending across the continent. They had full powers to dispose of this as they pleased, and to govern in such manner as was necessary to protect the interests of all concerned. The land had cost them little or nothing. Their problem was that of so managing the affair that by the investment of the least capital they might get the largest return in profits. They cared little or nothing for royal dignities, for manorial and feudal privileges. The enterprise appealed to them as a matter of shillings and pounds. How could they utilize this immense tract of land to their own highest interest? The manner in which they attempted to solve the problem was by appealing to the financial interests of others and thereby obtaining their co-operation. They laid their "proposition" before the public in much the same way that a modern mining company would do:

In America there were immense natural resources. These resources needed development. If developed they would become immensely valuable. A share in the advantages of development and of the resources of the new continent might be obtained through the company in several ways:

1. By Purchase.—By the payment of £12 10s. a bill of adventure, or one share of stock, might be obtained. This entitled the holder to one hundred acres of land at once and after this was settled, or "seated," one hundred acres additional upon the second distribution.<sup>41</sup> All who received bills prior to 1625 were to be

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<sup>41</sup> This was represented to take place about 1616.

exempt from quit rents. They were also entitled to their pro rata of the profits.

2. By Services Rendered.—These might be of several kinds. Those who became tenants or servants of the company previous to the return of Sir Thomas Dale were to be allowed, at the expiration of their term of service, a patent to one hundred acres of land and entitled to one hundred acres more at the second distribution, provided that a house were erected on the second hundred acres within three years. Such service was considered as equal to the purchase of one share. A planter who at his own cost went to a colony was given one hundred acres and placed on a one-share footing. One might also combine the rights of purchase and the rights of service and thus augment his economic advantage. Official service was to be recognized by grants of land suitable to the station of the officer; and for meritorious military or other service, involving sacrifice or valor, great liberality was shown.<sup>42</sup>

3. By Head Right.—Each shareholder who transported an emigrant, free or bond, was entitled to fifty acres if he remained in the colony three years, and fifty acres in the second distribution—i. e., the rights of one-half of a share. The same inducement was soon offered to all persons.

In addition the company offered civil order and military protection. To its own tenants and servants supplies were also furnished. Such may be considered the “prospectus” of the company.

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<sup>42</sup> In 1619 Captain Newport was given a bill of adventure equal to thirty-six shares and on his death his widow thirty-five more in recognition of his services to the colony. Many others were rewarded in like manner.

In that age of increasing accumulations of capital, on the one hand, and increasing economic pressure on the lower classes, on the other, the elements were at hand for the successful colonization of Virginia. The corporation brought together the elements of success in colonial enterprise. Under the economic advantages offered to settlers and the order secured by the military organization the colony grew; but, growing, the settlers demanded a form of political organization that would be primarily responsive to their own interests. The London Company, the corporation, with its principal officers, remained in England. It attempted to manage the colony through a branch office, so to speak, which had been established there. As a governmental organization it resembled a military despotism.

The democratic spirit soon manifested itself in political organization. When the corporation became practically bankrupt, through the infidelity of its officers, and certain co-operative companies desired to obtain grants of land with a certain local autonomy, this was conceded, as a result of which the English borough was taken for a model of local organization. Each plantation (settlement) and corporation (town) was to be a political unit. Yeardley, after the disastrous administration of Argall, was instructed to call an assembly to be composed of two representatives from each of the plantations and corporations. By this act, the Assembly of Burgesses, 1619, the local political units of the colony were cemented together into one political whole. The colony came to feel that it was politically superior to the company. The company itself, involved in conflicts and attempts at adjustment, finally, on June 16, 1624, by quo warranto proceedings was dissolved. Thereafter Virginia was a royal province, having its governmental machinery within the colony. The corporation had planted a colony—had laid the foundations for a nation. As an economic organiza-

tion it had been superior to the forms that had preceded it, but as a political organ it too must be regarded as a failure.

The Massachusetts Bay Company, in its origin, is involved in much the same form of corporate organization. Its history, however, was quite different. Some of the patentees of "the second colony" (New England) under the charter of 1606, after the failure of the Sagadahoc enterprise, had procured a charter from the King under the name of "The Council established at Plymouth, in the county of Devon [Eng.] for the Planting, Ruling and Governing of New England, in America." This corporation is known as "The New England Council." The powers granted and the form of organization was very similar to those under the Virginia charter of 1609. It was probably modeled after it. Massachusetts had become attractive by reason of its fisheries, and in 1623 a station had been established at Cape Ann. The enterprise had proven a failure, but six of the adventurers, in 1628, procured a grant of territory from "The New England Council." These persons, together with others, obtained from the Crown a charter of incorporation, confirming the territorial grant of "The New England Council" and adding full corporate and governmental powers. The corporation was known as the Company of Massachusetts Bay in New England. It was also modeled after the Virginia Company of 1609. The administration of its affairs was given to a governor, deputy and eighteen assistants, elected annually by freemen (members of the corporation), "which said Officers shall applie themselves to take Care for the best disposing and ordering of the generall buysines and Affaires of, for, and concerning the said Landes and Premises hereby mencoed, to be graunted and the Plantacion thereof, and the government of the people there." This administrative body was to meet once a month. Four times a year, "vpon

every last Wednesday in Hillary, Easter, Trinity and Michas Termes respectivele forever;" there was to be "one greate generall and solmye assemblie" of the company, to consist of governor, assistants and all the freemen that might attend, and this "greate and generall assemblie" was entrusted with full powers to choose and admit into the company so many as they should think fit, to elect and constitute all requisite officers and to make laws and ordinances for the welfare of the company and for the inhabitants of the plantation, "so as such laws and ordinances be not contrary and repugnant to the laws and statutes of the ralme of England."<sup>44</sup> The seat of government, however, remained in England till 1629, when, it being thought that the seat of government was too far distant, at a general court or "assemblie" held on the 29th of August in that year a general consent appeared by the erection of hands that "the government and patent should be settled in New England."<sup>45</sup> The government and charter were accordingly removed, and henceforth the whole management of all the affairs of the colony were confided to persons and magistrates "resident within its own bosom." The fate of the corporation, as well as the colony, was thus decided. The company at once began "to devote itself to the work of settlement and government. It laid aside commercial enterprise;<sup>46</sup> it no longer acted as a land company; it did not seek profit, but the general well-being of the colony. Instead of managing its lands, it disposed of them to towns or organized communities of persons. The township became the local political unit."<sup>47</sup>

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<sup>44</sup> Poore's Charters and Constitutions, Vol. I, p. 936-7.

<sup>45</sup> Bancroft, I, 224, 231.

<sup>46</sup> Commercial enterprise was left to private persons instead of being conducted by the company.

<sup>47</sup> See "The Colonial Corporation" by H. L. Osgood, Pol. Sci. Quart., Vol. XI, pp. 502 et seq.



The second decisive step by which the company became completely assimilated to the colony was one establishing the qualifications for membership. Many of the colonists made application to the general court for the privileges of "freemen."<sup>48</sup> In prescribing conditions the court ordered that "to the end the body of the commons may be preserved of honest and good men \* \* \* for time to come no man shall be admitted to the freedom of this body politic but such as are members of some of the churches within the limits of the same." The question of membership was made dependent on considerations of general welfare instead of those commercial or financial. By these acts the nature of the organization was completely changed; from a colonial company the corporation had become identical with the politically organized colony; it had become a Puritan commonwealth. The increase in the number of freemen and their dispersion over areas too broad to admit of their meeting in a general court for the transacting of public affairs soon led to the adoption of the representative system. Within the Massachusetts Bay Colony two evolutionary processes had gone on, viz., the transformation of a commercial corporation into a colonial commonwealth and the evolution of a system of representative government from a pure democracy. This was the last attempt to use the "London Company" as a model for colonization. It had succeeded in founding colonies, but as a political institution it could not survive.

One other colony owes its life to corporate enterprises—Georgia. This was not established till the next century. From the standpoint of a political organization it supplied more of the conditions of success than those of Virginia and Massachusetts. Its prime object was the welfare of the colonists instead of profit to the incorpo-

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<sup>48</sup> This term as used in the charter indicated men free to exercise the rights of membership in the corporation.

rators. Georgia holds a unique position among colonial enterprises. In 1732 James Oglethorpe, an English philanthropist, in order to relieve imprisoned debtors and persecuted Protestants, secured from George II. a charter grant to "all those lands, countrys and territories situate, lying and being in that part of South Carolina, in America, which lies from the most northern part of a stream or river there, commonly called the Savannah, all along the sea coast to the southward, unto the most southern stream of a certain other great water or river called the Alatamaha, and westerly from the heads of the said rivers, respectively, in direct lines to the South Seas<sup>49</sup> [Pacific]."<sup>50</sup> This charter also created Oglethorpe and eighteen others and their successors "a body politic and corporate in deed and in name, by the name of the Trustees for Establishing the Colony of Georgia, in America."<sup>51</sup> The corporation was in the nature of a trust, was eleemosynary in character. Its government was to consist of a President and a Common Council of fourteen members which was later to be increased to twenty-four. As an inducement to settlement it was declared that "every person or persons who shall at any time hereafter inhabit or reside within our said province, shall be and are hereby declared to be free, and shall not be subject to any laws, orders, statutes or constitutions which have been heretofore made or enacted, ordered or enacted for \* \* \* our said province of South Carolina; \* \* \* that forever hereafter there shall be a liberty of conscience allowed in the worship of God \* \* \* except papists \* \* \* so they be content with the quiet and peaceable enjoyment of the same, not giving offence or slander to the government," and the

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<sup>49</sup> Bancroft, II, p. 281.

<sup>50</sup> Poore, p. 373.

<sup>51</sup> Id., p. 369.

Common Council was given power "to distribute, convey and set over such particular portions of land, tenements and hereditaments \* \* \* unto such of our loving subjects \* \* \* that shall be willing to become our subjects and live under our allegiance in said colony upon such terms and such estates and upon such rents, reservations and conditions as the same may be granted, and as the said Common Council \* \* \* shall deem fit and proper." To make a liberal provision for the acquirement of estates in the colony it was provided that only four shillings should be charged per hundred acres, demised, planted or settled, "said payment not to commence or be made until ten years after such grant, demise, planting or settling." Besides this, no grant could be made "to any person being a member of the said corporation; or to any other person in trust for the benefit of any member of said corporation." Bequests were made by various philanthropic persons and societies; appropriations were made by Parliament, and every aid given to put the colony on a successful footing. The devoted spirit of Oglethorpe is shown on every hand. His treatment of the Indians was so just that his reputation was spread far and wide, and they came many hundred miles to form peace alliances and express their good feeling. Those prosecuted for conscience and financial misfortune in every land swelled the ranks of the colony. But again the fallacy of government by non-residents and those living under different conditions of life was demonstrated. The trustees were of the landed, feudal aristocracy. They did not understand the economic conditions of the new world. They made such laws as were adapted to the tenantry and the feudal establishments of their English home.<sup>52</sup>

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<sup>52</sup> The laws which the trustees had instituted were irksome. Their impracticability appears in the land system adopted. To insure an estate even to the sons of the unthrifty, to strengthen

On this account the colony "languished until at length the trustees, wearied of their own labors and the complaints of the people, in June, 1751, surrendered the charter to the Crown. Henceforward it was governed as a royal province, enjoying the same liberties and immunities as other royal provinces."<sup>53</sup>

The fourth form of experiment in colonial government, the voluntary association, was largely the result of accident. The adventurers who settled at Plymouth, Mass., had procured a patent to lands in Virginia under the London Company charter grant. In 1620 the Puritans set out in the Mayflower for their new home. As their original intention was to settle in territory over which government had already been established, no provision was made for the exercise of political powers except such as were provided for under the instructions of the London Council. Arriving off the New England coast in the beginning of winter, compelled by storm (or misguided by their Dutch pilot while in duress), they put in at Cape Cod for shelter and there they decided to remain. They were now confronted by unforeseen conditions. The territory upon which they were to land was not within the jurisdiction of the company from which they had obtained their grants. Here there was no legal sanction for control. Many of those under contract had already threatened to take advantage of this fact. Some form of political organization must be effected at once. These were the fortuitous circumstances which gave birth to the independent voluntary association as an instrument of colonization. On the 11th of November, while yet on shipboard, the under-

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a frontier colony, the trustees, deceived by reasonings from the system of feudal law and by their own prejudices as members of the landed aristocracy of England, had granted lands only in tail male. Here was a grievance that soon occasioned a just discontent.

<sup>53</sup> Story, Sec. 144.

takers of the enterprise organized themselves into a body politic by the following compact:<sup>54</sup>

In the name of God amen: We whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, etc., Having undertaken, for the Glory of God, and the Advancement of the Christian Faith, the Honor of our King, and Country, a Voyage to plant the first Colony in the Northern Parts of Virginia, Do, by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation and Furtherance of the Ends aforesaid: And, by Virtue hereof, do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Offices, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; Unto which we promise all due Submission and Obedience.

Their executive and administrative officers consisted of a governor, elected annually,<sup>55</sup> and one assistant. The supreme legislative power resided in and was exercised by the whole body of male inhabitants who were church members.<sup>56</sup> Afterward the number of assistants was increased to five and later to seven,<sup>57</sup> but the people continued to exercise the supreme law-making power for eighteen years. The evolution of a representative system was the result of colonial expansion and the adaptation of the political organization to the needs of the people. As the town of New Plymouth grew other settlements sprang up around it. Some of the settlers moved out to Duxbury<sup>58</sup> and established a township

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<sup>54</sup> Poore's Charters, p. 931.

<sup>55</sup> Plymouth Laws, Hazen's Col., I, p. 404, 408.

<sup>56</sup> Plymouth Laws, Hazen's Col., I, p. 408, 11, 12, 17.

<sup>57</sup> Plymouth Laws, Hazen's Col., I, p. 404, 8, 11, 12.

<sup>58</sup> Record, Vol. I, p. 62.

there, others went to Scituate.<sup>59</sup> In 1636 it was thought expedient to revise and codify the laws of the colony, and two representatives from the township of Scituate, two from Duxbury and four from Plymouth met with the court to put the law in convenient form.<sup>60</sup> The people in the outlying towns found it inconvenient to come to Plymouth to attend all of the meetings, therefore in November, 1636 it was decided to hold separate meetings for purposes of election of officers, at which the electors might send proxies. But still it was a finable offense for a freeman to be absent from the other meetings of the general court or assembly.<sup>61</sup> The impracticability of conducting affairs in this manner led to the adoption of a representative system in 1638. The primary assembly remained in theory, but in practice it met as an electorate.

Without any authority given from without either for the exercise of political powers or the occupation of territory, the Puritans had established themselves in a wilderness under the most adverse conditions. The political authority was supplied by social compact—an agreement of self-government; a year later a legal title to the territory was procured from "The New England Council." By these acts they had avoided conflict and established a state—a state built by their own hands and which continued to exercise its powers without incorporation or coming under power of the Crown till it was finally absorbed by the Massachusetts Bay Colony; the two colonies were organized as the Royal Province of Massachusetts. The successful experiment at New Plymouth was repeated fourteen years later in the Connecticut Valley. This region had been prospected by

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<sup>59</sup> Record, Vol. I, p. 44.

<sup>60</sup> Record, Vol. XI, p. 6.

<sup>61</sup> At one meeting in 1638 sixteen freemen were fined for non-attendance.

Oldham and Hall in the interest of trade with the Indians. In 1633 a few Plymouth people opened a trading post at Windsor. An agricultural settlement was made at Wethersfield in 1634. Windsor, in 1635, and Hartford, in 1636, were the nuclei of two others. These agricultural settlers being freemen of Massachusetts Bay, obtained license from and were at first considered as being under the jurisdiction of that colony. They were, during the first year, governed by officers appointed by the Massachusetts Bay court, but as their commissions were not renewed the inhabitants organized themselves into independent towns and thereafter managed their own affairs.<sup>62</sup>

The first form of independent political organization in the colony was that of the town, or township. After the Massachusetts Bay colony relinquished control these local political units constituted in and of themselves the sovereign authority over their various members. That authority was exercised by the people organized in town meetings as a democracy. Common necessity and common interest brought those various towns together. The necessity of maintaining order within—of marking out their several jurisdictions and avoiding conflict, the danger of extermination at the hands of the hostile Pequott from without—all these circumstances taught them the advantage of union. The joint meetings, at first in the nature of conferences and temporary agreements, soon matured into a central governmental structure. May 1st, 1637, is assigned as the natal day of the Connecticut colony.<sup>63</sup>

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<sup>62</sup> See Andrews, *The Beginnings of the Connecticut Towns*, Ann. of Am. Acad. Vol. I, p. 165, et seq.

<sup>63</sup> 'Accordingly the subsequent court meeting at Hartford, May 1, 1637, for the first time took the name of the "Genrall Corte," and was composed, in addition to the town magistrates who had previously held it, of "committees" of three from each town. So simply and naturally did the migrated town system evolve, in this binal assembly, the seminal prin-

The "General Corte" thus formed, however, was only a provisional government. On January 14th, 1638, the colony adopted a formal constitution—a government of their own organization, based on social compact, in which neither King, Parliament, home corporation or proprietary lord had a place—a true republic. As the "agreement between the settlers at New Plymouth" made on board the Mayflower was the first fundamental compact, making authoritative provision for government by voluntary agreement among the members of society to be governed, so this may be said to be the first written constitution, the first clearly formulated governmental structure, based on social compact. Its preamble recites:

Forasmuch as it hath pleased the Almighty God by the wise disposition of his divyne Prudence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield now cohabiting and dwelling in and vppon the River of Conectecotte and the lands ther unto adioyneing; and well knowing where a people are gathered together the word of God requires that to mayntayne the peace and vnion of such a people there should be an orderly and decent gouernment established according to God, to order and dispose of the affayres of the people at all seasons as occasion may require; doe therefore assotiate and conioyne ourselves to be as one Public state or Commonwealth.<sup>64</sup>

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ciple of the Senate and House of Representatives of the future state of Connecticut. The assembly further showed its consciousness of a separate existence by declaring "an offensive warr agt the Pequoitt," assigning the portions of its minia-ture army and supplies to each town and appointing a commander. In June it even ordered a settlement to "sett downe in the Pequoitt Countrey & River in place convenient to maynteine or right yt God by conquest hath given to us." So complete are the features of Statehood, that we may fairly assign May 1, 1637, as the proper birthday of Connecticut. No King, no Congress presided over the birth; its seed was in the towns.'—Johnson, *Genesis of the New England States*, p. 14.

<sup>64</sup> Poore's *Charters and Constitutions*, Vol. I, p. 249.



The constitution then makes specific provision for the structure of the body politic and the exercise of its functions; for two "generall assemblies or courts," per year; for the election of governor, magistrates and deputies, and the manner of conducting elections; for the qualifications of officers and electors; the powers of the various departments, etc. Section 10 is most significant in its constitutional provisions:

It is ordered, sentenced and decreed that euery Generall Courte, except such as through neglecte of the gournor and the greatest prte of magestrats the Freemen themselves doe call, shall consist of the Governor or some one chosen to moderate the Court and 4 other magistrats at lest, wth the mayor prte of the deputyes of the seuerall Townes legally chosen; and in case the Freemen or mayor prte of the through neglect or refusall of the Governor and mayor prte of the magistrats shall call a Courte, yt shall consist of the mayor prte of Freemen that are prsent or their depuytes, wth a Moderator chosen by the: In wch said Generall Courts shall consist the supreme power of the Commonwealth, and they only shall haue power to make laws, or repeal the, to grant leuyes, to admitt of Freemen, dispose of lands vndisposed of, to sevrall Townes or prsons, and also shall have power to call ether Courte or Magestrate or any other prson whatsoever into question for any misdemeanour, and may for just causes displace or deale otherwise according to the nature of the offence; and also may deale in any other matter that concerns the good of this Commonwealth, except election of magesstrats wch shall be done by the whole boddy of Freemen.<sup>65</sup>

This constitution served them till 1662, when the New Haven and Connecticut colonies were united under one government—a government very similar to that now in operation in that State.

Following Connecticut, Rhode Island next assumes

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<sup>65</sup> Poore's Charters and Constitutions, p. 251.

the role of self-made State. Its government seems almost wholly the product of its own immediate environment, and most free from the influence of extraneous forces. Here we have a colony "that was neither previously planned nor planted;" it simply grew. It had no guiding paternal government; no primary corporation as an organized center; no founder. It was in truth a voluntary association.<sup>66</sup>

In January, 1636, Roger Williams, and about twenty others, left Salem that they might avoid the harshness of religious law and opinion and established a plantation on Narragansett Bay.<sup>67</sup> From this time till August 20, next, "the masters of families had ordinarily met once a fortnight and consulted about their common peace, watch and planting."<sup>68</sup> At this time a formal written agreement was made which was signed by thirteen newcomers and which set forth in the form of an oath of allegiance the authority claimed by the people in their assemblies.<sup>69</sup> The government was at first a pure democracy.<sup>70</sup> Not till 1640 did they reach the point of a regular election of town officers and "agree for the time to choose the various officers required."

Providence having grown and prospered, other towns were established—Portsmouth in 1638, and Newport in 1639. They were independent communities, purely

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<sup>66</sup> Foster, Town Govt. in R. I., p. 7.

<sup>67</sup> Foster, Town. Govt. in R. I., p. 8, 45, 76.

<sup>68</sup> Letter of Williams to Winthrop—Narragansett Club Pap. IV, 4.

<sup>69</sup> "This agreement went into immediate effect and constituted the town government for several years." Staple's Annals, p. 44.

<sup>70</sup> "The government was at first a pure democracy. Not an aristocracy, in which certain chief members of the community assumed the authority, not even a representative republic, in which the interests of all were subserved by the delegation of actual legislation to a particular number. There was no selection; and there was no delegation." Town Govt. in R. I., p. 16.

democratic in their government, making their own laws, administering their own justice.<sup>71</sup>

In 1640 Portsmouth and Newport coalesced.<sup>72</sup> There was great strife between these towns on the one hand and Providence and Warwick on the other. The twofold danger of being swallowed up by the stronger jurisdiction of Massachusetts from without and of being torn by disorders from within, drove them into political union. Roger Williams, in 1643, in order to secure a surer foundation, both of title and government, procured a charter which among grants of political freedom to American colonies takes first rank.<sup>73</sup> After reciting the facts of settlement, of the necessity of protecting the plantations, of services rendered, of the purchase of land from the Indians, and of their desire for a "free Charter of Civil Incorporation and Government," the charter provides:

In due consideration of the said premises \* \* \* out of a desire to encourage the good Beginnings of the said Planters, Do, by the authority of the aforesaid Ordinances of the Lords and Commons, give, grant, and confirm, to the aforesaid Inhabitants of the Towns of Providence, Portsmouth and Newport, a free and absolute Charter of Incorporation \* \* \* Together with full Power and Authority to rule themselves, and such others as shall hereafter inhabit within any Part of said Tract of land, by such a Form of Civil Government, as by voluntary consent of all, or a greater part of them, they shall find most suitable to their Estate and Condition; and for that End to make and ordain such Civil Laws and Constitutions, \* \* \* as they, or a great Part of them, shall by free consent agree unto.<sup>74</sup>

By this grant the right to govern by common consent and according to their own free constitution was secured

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<sup>71</sup> Foster, *Town Govt. in R. I.*, pp. 17, 18.

<sup>72</sup> *Town Govt. in R. I.*, p. 10.

<sup>73</sup> Poore's *Charters*, p. 1594.

<sup>74</sup> Poore's *Charters and Constitutions*, p. 1595.

and in 1647 the freemen of these towns met in general assembly and organized a central government for the colony of Rhode Island.

In this "common government," however, the people did not part with the lawmaking function. The colonial legislature, created by "the code" of 1647, consisting of a president, eight assistants and twenty-four commissioners, had no power to originate legislation. The laws were first proposed and discussed in the towns. When all four of the towns, each by itself, had acted on and favorably considered the proposed law it was to be passed on by the General Assembly, whose action was simply a final ruling upon it. "Thus," says Arnold, "the laws emanated directly from the people."

In 1663 the General Assembly<sup>75</sup> was given power to originate laws and was invested with authority "from tyme to tyme to make, ordayne, constitute, or repeal such lawes, statutes, orders and ordinances, fformes and ceremonies of Government and magistracy as to them shall seem meete for the good and welfare of the sayd company and ffor the good government \* \* \* of the people."<sup>76</sup>

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<sup>75</sup> Town Govt. of R. I. (Foster), p. 19.

<sup>76</sup> Poore's Charters and Constitutions, p. 1597.

Yet so apprehensive were the towns of any tendency to drift away from "the people" that the election of delegates to this body was to recur as often as once in six months. For no longer time were the towns willing to entrust the management of their affairs to the body which they themselves had created. "Another feature of no less importance in this connection is the attempt, made with great determination and persistency, to connect this semi-annual session of the colonial government as really and fully as possible with the actual, individual, undelegated suffrages of every citizen of every town. At the outset, in so small a colony as this, it was possible; and twice a year, therefore, in May and October, the citizens themselves of Providence, Warwick, of Portsmouth—of whatever part of the state—assembled in person at Newport, and there in solemn council cast their votes for those who they decreed should deliberate for them for the ensuing six months. This over they returned to their houses, having inaugurated the

A fourth essay at government building by voluntary association was made in 1638. The first government at New Haven has been called a theocracy, having Davenport and Eaton, as the representatives of God, at its head. Without doubt its object was largely industrial, and from an industrial standpoint the relation of its various members was akin to that of a voluntary joint stock company. Though Davenport and Eaton were the head of the company, "they did not presume to act without bringing together, from time to time, the free planters of the colony and with the legislation of such democratic assemblies the records of New Haven Town and Colony begin."<sup>77</sup> While little is known of the first government of New Haven, we do know that the basis of their political organization was a compact made on "the first day of extraordinary humiliation," after they came together, in which they agreed that "in all publique offices wch concerne civill order, as choyce of magistrates and officers, making and repealing of lawes, dividing and allotment of inheritance, and all things of like nature," they would all of them be ordered by the rules which the scriptures hold forth. On June 4th, 1639, at Mr. Robert Newman's barn, "all of the free planters assembled together in a generall meetinge to consult about settling civill government."<sup>78</sup>

On October 25 of that year a committee of seven men qualified for the foundation work of organizing a government having been appointed, the state took definite

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session, so to speak, and left it to run of itself for the remainder of the time. Of course, the natural tendency of any such system as this was to a gradual modification, by reason of inconvenience and even impossibility of personal attendance, in many instances; and this was met by a gradual introduction of the system of proxy votes.. But the votes of the citizens, personal and proxy, continued to be cast, at Newport, until 1760."—Town Govt. of R. I., pp. 25-6.

<sup>77</sup> Cf. Livermore, Republic of New Haven, p. 14

<sup>78</sup> Cf. Livermore, Republic of New Haven, p. 17.

form.<sup>79</sup> Eaton, Davenport and five others were the "seven pillars" for the new house of wisdom in the wilderness, and these seven met together, abrogating every previous trust, admitting to the court all church members,<sup>80</sup> established a government consisting of a governor, deputy, magistrates and two delegates elected by the freemen from each plantation. The legislature consisting of all these officers, was entirely representative, and was declared to be "the supreme power, under God, of this independent dominion," and had authority "to declare, publish and establish the laws of God, the Supreme Legislator, and to make and repeal orders for smaller matters not particularly determined by the scriptures, according to the general rules of righteousness; to order all affairs of war and peace and all matters relative to the defending or fortifying of the country; to receive and determine all appeals, civil and criminal, from any inferior court, in which they are to proceed according to Scripture light, and the laws and orders agreeing therewith."<sup>81</sup> Other towns, together with their territory, were annexed to New Haven by treaty and purchase,<sup>82</sup> and later the governments of New Haven and Connecticut were federated under a common charter and constitution.<sup>83</sup>

The government of New Haven, prior to its federa-

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<sup>79</sup> Republic of New Haven, p. 22. Bancroft gives the time as August. See Vol. I, p. 272.

<sup>80</sup> Bancroft, I, p. 272.

<sup>81</sup> Story on the Const., Sec. 85.

<sup>82</sup> "In this manner five independent and co-ordinate towns were formed. The neighboring towns of Milford and Guilford, bought in 1639, were independent at first, but admitted by the general court in 1643. Stamford bought in 1640, was admitted 1641, Southold, L. I., bought 1640 and admitted 1649. Greenwich was also bought in 1640, but the Dutch seduced the purchasing agents into making it a Dutch town."—The Genesis of a New England State, p. 22, 23.

<sup>83</sup> The Genesis of a New England State, p. 26-7; Republic of New Haven, p. 156.

tion with Connecticut had been purely a government by compact. It had been evolved from the community itself. There had been no dependence on, no recognition of a higher power except the Supreme Being.

Since Vermont is a much later establishment, we will do nothing more than to assign it a place within the classification adopted as a voluntary association.<sup>84</sup> In the history of the voluntary association, therefore, we have the modern representative government, with all its essential forms and functions, evolved from a pure democracy. Beginning with pure democracy, as population increased and its territorial area enlarged, as the demands of society grew, it became economically impossible for the people in assembly to make the laws and carry on the other functions of government. It became necessary with every change in the social environment to recast its political institutions in such a manner as to subserve the public welfare. It has been found that pure democracy could not exist and serve the needs of government over large areas and populations. Representative government is the device of a free democratic society to that end. The governments of the voluntary associations are truly a product of environment, their growth an adaptation, operating under "the law of advantage."

But feudal Europe gave us a fifth model for colonial government—the proprietary. The voluntary association had been the product of the Puritan congregation taken out of the settings of the old world and brought face to face with nature and the necessity of

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<sup>84</sup> The communal town of Guilford, Vermont, furnishes a parallel to the Rhode Island and New Haven governments, in so far as it carried on and exercised the political functions of an independent sovereign state for many years. The unprinted manuscript of Miss Dora Wells on file in the Library of the University of Chicago, title: "The Republic of Guilford," affords a reliable account of this primitive community.

maintaining social order. The period during which it was permitted to grow unhampered by royal prerogatives and arbitrary assumptions was one of popular agitation and political revolution in England. The proprietary was the product of conservatism. It was an ante-Puritanic form. When Protestantism was persecuting those of Roman Catholic faith and they sought relief in the wilds of the western continent, their conservative spirit and training led them to retain established forms, and established forms found expression in the proprietary. After the Restoration the proprietary became the principal agency by which new colonial enterprise was conducted.<sup>85</sup> It was a reaction against Puritanism. The territory of Maryland had, originally, been ceded to the London Company, but with the withdrawal of the charter of that corporation and its dissolution all sovereign rights had reverted to the Crown. In the year 1632 a patent was granted to Lord Baltimore. Under this patent he was made lord proprietor, with authority, by and with the consent of the freemen or their delegates assembled for the purpose, to make all laws for the province, "so that such laws be consonant to reason and not repugnant or contrary, but, as far as conveniently might be, agreeable to the laws, statutes, customs and rights of the realm of England."<sup>86</sup>

The colony consisted of 200 gentlemen of fortune and rank, with their attendants.<sup>87</sup> The first legislature, 1634-5, was made up of the freemen at large gathered in popular assembly,<sup>88</sup> but by 1638 the colonists had so largely increased and had become so widely scattered on

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<sup>85</sup> All of the proprietary establishments that proved of lasting importance except one, Maryland, were founded during the period of the Restoration.—H. L. Osgood, *Am. Hist. Rev.* II, 648.

<sup>86</sup> Poore, *Charters and Constitutions*, p. 809.

<sup>87</sup> Story on the Constitution, Vol. I, Sec. 106.

<sup>88</sup> Bancroft, Vol. I, p. 162.



plantations and manorial estates that the representative assembly became a necessity.<sup>89</sup> The legislature, once set in motion, gradually assumed more and more of the legislative powers of government.<sup>90</sup> In 1650 it declared that no taxes should be levied without the consent of the General Assembly.<sup>91</sup> The revolt against absolutism, in England, seems to have had its effect on the colonies. With the revolution of 1688 the executive powers were seized by the Crown, but it was again in 1716 restored to the proprietary,<sup>92</sup> limited, however, by the encroachments of the representative legislature. The people of the colony, having gained control of legislation, prescribed the powers of the proprietor and the administrative departments in such a manner as to make them conserve the interests of the colony. In this capacity the proprietor served the colony till the American Revolution.

In 1664 Charles II. granted unto his "dearest brother James, Duke of York," that territory, which, in the main, constituted the States of New York, Vermont, New Jersey, and Delaware, "with all ye lands, islands, soyles, rivers, harbours, mines, minerals, quarryes, woods, marshes, waters, lakes, ffishings, hawking, hunting, and fowling, and all other royalltyes, proffitts, commodities, and hereditaments to the said severall islands, lands and premises." Grants of power were also made to the proprietary or his assigns as follows:

And we do further of our special grace, certaine knowledge and meere mocon (motion) for us our heirs and successors give and grant unto our said dearest brother James Duke of Yorke, his heirs, deputyes, agents, com-

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<sup>89</sup> Story, Vol. I, Sec. 107. As to the character of the code adopted see Doyle, "Virginia, Maryland and the Carolinas," p. 296-7.

<sup>90</sup> Doyle, *Id.*, p. 313-27.

<sup>91</sup> Bacon's Laws of Md., 1650, ch. 25.

<sup>92</sup> Bacon's Laws of Md., 1692, 1716.

missioners and assigns by these presents, full and absolute power and authority to correct, punish, pardon, goverene and rule all such the subjects of us, our heirs and successors (as) from time to time adventure themselves into any of the parts or places aforesaid or that shall or doe at any time hereinafter inhabite within the same according to such lawes orders ordinances, direcions and instruments as by our said dearest brother or his assigns shall be established, and in defect thereof, in cases of necessity, according to the good direcons of his deputyes, commissioners, officers and assignes respectively as will in all cases and matters capitall and criminall as civill both marine and others soe alwayes as the said statutes ordinances and proceedings be not contrary to but as near as conveniently as may be agreeables to the lawes, statutes and government of this our realme of England, and saving and reserving to us, our heirs and successors, ye receiving, hearing and determining of the appeal, or appeals of all or any person or persons, of in or belonging to ye territoryes or islands aforesaid, in or touching any judgment or sentence to be there made or given.<sup>93</sup>

The usual authority was also given to exercise martial law in case of rebellion, insurrection or invasion.

In June of this year, that part of the territory subsequently known as New Jersey, was by the Duke, granted to Lord Berkeley and Sir George Carteret. In 1682 the Duke released his claim to Delaware to William Penn. The claim of New York to Vermont was not settled till after the Revolutionary war.

In the war between England and Holland, 1665-1674, the title of New York was first confirmed in the English by the treaty of Breda, 1667; it was again retaken by the Dutch, but finally restored to the English by the treaty of Westminster in 1674 and a new grant made by Charles II. to the Duke of York confirming his proprietary rights under which he ruled the province till

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<sup>93</sup> Poore's Charters, p. 784.

called to the throne of England, when it became a Crown province.

When the Duke established his government in New York he found there a government already in operation. Although beginning as a monopoly enjoyed by comparatively few, the government under the Dutch had become, in a measure, representative.<sup>94</sup> The people, under the proprietary, felt the restraint of their rights, and a general demand arose for a popular voice in government, but this was not accorded till 1682, when the governor was authorized to call an assembly, with power to make laws for the general regulation of the state, subject to ratification by the proprietary. After the English revolution of 1688, which deprived James II. of his crown, the people, having taken side with the Prince of Orange, William III., were deemed to have the privileges of his subjects. In 1691 an assembly was called which framed a constitution. This constitution provided that the supreme legislative power should forever reside in a governor, a council, appointed by the Crown, and representatives of the people convened in general assembly.<sup>95</sup> With the accession of James to the Crown the proprietary had ceased and the colony was organized as a royal province on a representative basis.

New Jersey was a part of the territory granted to the Duke of York and by him in turn, June, 1664, granted to Lord Berkeley and Sir George Carteret, with all of the rights, royalties and powers of government which he possessed. In 1664 these proprietors agreed upon a constitution of government "which was so much relished that the Eastern part soon attained a considerable population." The governmental structure consisted

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<sup>94</sup> Dutch Village Communities in the Hudson, p. 19 et seq.

<sup>95</sup> Laws 1691.

of a governor and council, with appointing power, and a general assembly, composed of the governor, council and deputies chosen by the people. This general assembly had full power to make laws for the government of the province "so that the same be consonant with reason and as near as may be conveniently agreeable to the laws and customs of His Majesty's realm of England," to constitute courts, to levy taxes, to erect manors and forts, etc. Although the territory and government was divided between the proprietors (1676), and the proprietary interests, later, were transferred by assignment, the form of government remained almost the same till surrendered to Queen Anne (1702) when it was again united in one province, the chief executive and administrative functions being placed in the hands of a governor and council appointed by the Crown, the legislative remaining with a General Assembly of representatives with power to make all laws and ordinances for the welfare of the people.

The history of Pennsylvania begins with the grant of 1681, made by Charles II. to William Penn. By this grant he was made proprietor and authorized "to make all laws for raising money and other purposes with the assent of the freemen of the country or their deputies assembled for that purpose." In 1682 Penn published a "frame" which provided for a government composed of governor, council and assembly. This "frame" was renewed with slight modifications in 1683 and 1696. The government established was representative in the legislature, the Assembly being made up of delegates chosen by the freemen of the counties. The subsequent changes were in the nature of enlargement of the powers of the people and their representatives and the reduction of those of the proprietor and his appointees until, though proprietary in form, the people enjoyed the same liberties as did the other colonies as royal provinces.

Delaware needs no further account here than that its territory was ceded to Penn by the Duke of York and that its government was exercised under the same proprietary as that of Pennsylvania, with practically the same powers and modifications.

The institutional beginning of the New Hampshire colony was in 1629. Its character was fixed by a proprietary grant to Captain John Mason, by which he was to "establish such government in the said portion of lands and islands granted unto him as shall be agreeable, as near as may be to the Laws and Customs of the Realm of England."<sup>96</sup> In 1635 a fourth grant was made to Mason, by which the land with all its uses, and all "Royalties, jurisdictions, privileges, preheminences, profits, comoditys and hereditaments whatsoever, \* \* \* with powers of judication in all cases and matters whatsoever, as well criminal, capitall, and civil," were ceded.<sup>97</sup>

A controversy arose over the boundaries, upon which the matter came before the King in council, and in 1679 the government of New Hampshire passed over to the Crown and there was established a form by which the executive power was vested in a president and council appointed by the Crown, the administration of justice conducted according to "the form of proceedings in such cases, and the judgment thereon be as consonant and agreeable to the laws and statutes of this our realm of England as the present state and condition of our subjects inhabiting within the limits aforesaid \* \* \* will admit," and the legislative power was given to an Assembly composed of president, council and representatives chosen by the towns.<sup>98</sup> The Assembly made up as above set forth, was authorized to levy taxes and make all laws for the interest of the province. This

<sup>96</sup> Poore's Charters, Vol. II, p. 1272.

<sup>97</sup> Poore's Charters, Vol. II, p. 1273-4.

<sup>98</sup> N. Hampshire Prov. Laws, Ed. 1771, p. 1 et seq.

form of government was continued down to the revolution.

The political history of the Carolinas begins in the year 1663.<sup>99</sup> In that year eight patentees<sup>2</sup> obtained a grant to all the land between the southern boundary of Virginia and the St. Mathias river in Florida. It gave to the proprietors sovereignty over the territory, making reservation only that the inhabitants should "be subject immediately to our Crown of England, as depending thereof forever."<sup>3</sup> There were settlers in the territory at the time. These, together with those who subsequently came, are classified by Doyle as forming four groups:<sup>4</sup>

1. A settlement from Virginia on Albemarle river, which became the nucleus of North Carolina.
2. A settlement from New England near Cape Fear which dispersed and was absorbed in No. 1.
3. A settlement from Barbadoes, also near Cape Fear.
4. A settlement from England at Charlestown.

<sup>99</sup> In 1629 Sir Robert, afterwards Chief Justice, Heath, obtained from Charles I, a grant to the lands south of Virginia. His object was to divide the territory into smaller tracts and sub-let it to others who were to manage the details of settlement. This should not be included as a part of the political history for two reasons: First, it was a land grant, and secondly, it was a failure and the grant was finally cancelled.

<sup>2</sup> The patentees appearing in the charter were: "Edward, Earl of Clarendon, our High Chancellor of England, and George, Duke of Albemarle, master of our horse and captain general of all our forces, our right trusty and well-beloved William Lord Craven, John Lord Berkly, our right trusty and well beloved Chancellor, Anthony Lord Ashley, Chancellor of our exchequer, Sir George Carteret, Knight and Baronet, vice Chamberlain of our household, and our trusty and well beloved Sir William Berkley, Knight, and Sir John Collerton, Knight and Baronet.—Poore's Constitutions, p. 1382.

<sup>3</sup> Poore's Constitutions, p. 1389.

<sup>4</sup> Doyle, Id. p. 331.

This more than once changed its site, absorbed No. 3 in the course of its wanderings and finally grew into South Carolina.

Two Governors were appointed, one over the settlements to the north and the other over those to the south of the Chowan river.<sup>5</sup> These Governors were to have power to appoint all officers except secretary and surveyor, and to make laws with the consent of the freemen. In 1667 the proprietors adopted a constitution which provided for government on the ~~ancient~~ feudal basis.<sup>6</sup>

The government was to be a territorial aristocracy with the proprietors at its head. The eldest of them was to take rank as Palatine, with a certain limited pre-eminence. At his death this rank was to devolve on the proprietor next in age. The whole country was to be divided into counties, each consisting of eight seniorities, eight baronies and twenty-four colonies containing twelve thousand acres apiece. Of these the seniorities were to pertain to the proprietors, the baronies to the subordinate nobility, the colonies to the commonality. Each proprietor was to hold one seniority in every county. The nobility below the proprietors was to consist of landgraves, one from every county, holding four baronies each, and caciques, two for every county, holding two baronies each. These dignitaries were to be nominated by the proprietors. \* \* \*

The executive power and the judicial power was vested in the proprietors, each of whom was to be an officer of state. The titles of the seven below the Palatine were to be chancellor, chief justice, constable, admiral, treasurer, high steward and chamberlain. \* \* \* Each of these officers of state was to be assisted by a court.\* \* \* In addition to these seven courts, the whole body of eight proprietors was to sit under the title of the Palatine's court. \* \* \* The Grand Coun-

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<sup>5</sup> Afterwards known as Albemarle. See McCrady, pp. 74-5.

<sup>6</sup> Locke's Constitution. See Poore, p. 1396.

cil was to consist of the whole body of proprietors and councilors from the various courts.

The remaining legislative powers were vested in the Parliament. This was to consist of all the proprietors or their deputies, the landgraves, caciques, and the representatives of the freeholders. In addition, lords of manors were empowered to hold leet-courts.<sup>7</sup>

One can scarcely imagine a more arbitrary plan of government. The Crown having assumed sovereignty over the territory, granted jurisdiction to his favorites. These favorites then set about to secure their power by all of the fictions of absolutism known to the government—feudal tenure, hierarchy, nobility, on the one hand, tenantry, subordination, slavery, on the other; and in order to train the conscience to the support of these institutions, an established church under the control of the nobility.<sup>8</sup> It reminds one of the establishments of William the Conqueror, except that the proprietors had not the adaptability of the Norman. They elaborated a plan suited only to a large and densely populated country, such as the one in which they had lived, instead of a simple organization adapted to colonial conditions. It is needless to say that their finely devised scheme was not a success. If they had conquered a territory thickly settled with civilized people and had made its inhabitants their serfs and subordinates; if there had already been developed an industrial foundation sufficient to support

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<sup>7</sup> Doyle "The Carolinas," pp. 335-7.

<sup>8</sup> The influence of such a regime appears from the fact that in many places the slave population from the beginning was twice as large as the free, and of the free but a fraction were freeholders. Not only was the negro used as the basis of a servile industrial population, but the Indians, natives of the soil, were pressed into service. "The Indian," says Doyle, p. 359, "was kidnapped and sold, sometimes to work on what had once been his own soil, sometimes to end his days as an exile and bondsman in the West Indies. As late as 1708 the native population furnished a quarter of the whole body of slaves." But even these measures did not give sufficient foundation for the successful operation of Locke's constitution of government.



such a superstructure of parasitic nobility, then it might have been a success: but conditions in the colony were such as to absolutely forbid. One and only one part of the fundamental constitution was put in force at the outset. Each proprietor nominated a deputy. The colony was divided into four precincts, each of which, by a temporary arrangement, was to return four members. A Parliament, however, was not held, and the colony continued to be governed by the council till popular pressure became too strong to resist. The constant effort on the part of the proprietors to assert claims under the constitution which were adverse to the interests of the planters led to turmoil and revolution. Slight modifications were made in the constitution in 1670 and 1682 to no avail. In 1698 still greater modifications were made with a design to bring the constitution more in harmony with the needs of the people. But the influence and authority of the proprietors was lost. In 1729 the proprietary government, such as it had been, came to an end. The Crown purchased the rights and the demands of the colonists were satisfied by the establishment of a Crown government with a local representative system. Later, 1732, the territory was, for convenience, divided and the two royal governments of North and South Carolina were established on practically the same basis as the other colonies.<sup>9</sup>

In the American colonies we find an epitome of the development of the modern state. Of these, those colonies which were not established upon the basis of existing, old world, institutions, being small, isolated, industrial communities whose chief advantage in organization was that of controlling nature and making it sub-

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<sup>9</sup> The proprietary in all of the colonies where established found itself ill adapted to American conditions. Its whole history was one of modification and adaptation which finally wrought a complete extinction of the institution.

servient to their wants, found their economic interests best served by a purely democratic government in which the people came together, discussed matters of mutual concern and acted in such manner as seemed to the highest well-being of all. But with the multiplication of these small industrial groups, with broader organization made possible, common dangers and common interest made it advantageous for them to unite, and, uniting, it became necessary to recast their institutions in such a manner as to conserve the welfare of a larger society. In adapting their polity to the interests of a numerous population, distributed over a wide area, the principle of local self-government was retained for the local units and the principle of representation was established for the central organism, while the desire for security, in their possessions and in their industrial polity, against the designs of larger and more powerful political organizations moved them to place themselves under the protection of English sovereignty by procuring charter grants. Those colonies which were at first established under charter grants found themselves under the same political and economic necessity of moulding their polity so as to conform to the principle of general welfare. The private corporation, as a superior, controlling political agent, became extinct; the feudal organization expired; the proprietary lord found it necessary to adopt the principles of representative self-government and finally to give way—to yield his executive power to the direct representative of the Crown; the corporate establishment, that based on the principle of the joint stock company, was forced to turn over the reins of government to the political people. On the one hand, therefore, we find the modern industrial state developed from a democratic, self-organized, self-governed, local industrial community; on the other hand we witness its reduction from the establishments of monarchy and the polity of conquest

both meet in the adoption of a common form of representative government, subservient to the economic interests of the people, a form of government operating under the protection of the sovereignty of Great Britain.

In lands where kings have fought for wounded pride, where dreams of conquest and empire, the code duello, the spirit of chivalry and other remnants of absolutism have played a leading part in affairs of state, the industrial interests have often been lost sight of. Here in America the industrial forces of society, from necessity, were dominant in the beginning, and since that time have been the leading factors in every new political formation. This being the prime motive of our society in the establishment of government, its polity being based on the general welfare, all assumptions of sovereignty on the part of England which were opposed to this interest were resisted with united force. Finally the thirteen colonies, having won their independence from the absolutism of the British colonial policy, for the purpose of furthering their economic interests by establishing for themselves a broader sovereignty adjusted to their economic well-being, organized under a federal constitution and provided for the admission of other States on the same footing. Instead of that sovereignty being vested in a King, it was retained by the people whose interests it was organized to protect. The sovereignty of each separate State had, during the confederacy, been in the people of that State. Now the sovereignty of the United States was in the people of the empire. The exercise of its functions was apportioned among the Federal and State governments in such manner as the people of the United States in the formation and adoption of their constitutions adjudged to be to their highest welfare.<sup>10</sup> In the organization of their gov-

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<sup>10</sup> For further discussion of this subject see Chap. IV.

ernment and the apportionment of the exercise of sovereign powers the people retained to themselves a place; they, to that extent, incorporated themselves in and became a part of the government. Among the powers the exercise of which the people retained to themselves are the following:

(1) The right of altering and abolishing any form of government which was opposed to the general welfare and of "organizing its powers in such form as to them seems most likely to effect their safety and happiness."

(2) The right of appointing (electing) officers and agents of government to perform those functions which, under the constitutions adopted by them, were to be performed by their representatives.

(3) The right to impress their will on the agents of government.

(4) The right to participate in certain acts of legislation and administration in which they deemed to their best interest to have a direct voice.

It is with the evolution of popular co-operation in these capacities that the chapters following have to do.

## CHAPTER III.

GOVERNMENT BY POPULAR ASSEMBLY, OR PURE  
DEMOCRACY; ITS EVOLUTION AND PRESENT  
PLACE IN OUR SYSTEM.

The growth of our institutions during the colonial period, was from the smaller to the larger political whole. The primitive plantation grew. The colonial government, which at first was coterminous with a single town or settlement, came to include several. The primitive settlement evolved the commonwealth. Finally, the several commonwealths, by federation, became an empire. In this federation that polity which seemed best adapted to the welfare of the local community was retained by it; that more general polity which seemed best adapted to the welfare of the several States (commonwealths) was retained by them; while for the federation (the empire) a still broader polity was established for the purpose of conserving the welfare of the federated whole.

In all this complex system, elements of pure democracy may be found from its inception. Popular co-operation in government has appeared in two forms, viz.: Co-operation by popular assembly, or in pure democracy, and co-operation in election and by what has become known as the referendum,<sup>1</sup> or in representative democracy. It is the form of co-operation first named that attracts our attention during the colonial period. The township, the parish, the tithing, the unincorporated town, the hundred, the manor, the borough, the county, and, in the very earliest times the central government

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<sup>1</sup> For definition of the referendum, see Chap. IV, p. 100, n. 2.

of the colony, are political divisions in which the people themselves assembled for the purpose of exercising functions of government. The colonies in which all of the political people assembled in a public capacity were Rhode Island, Plymouth, New Haven, Massachusetts Bay and Maryland; but, as shown above (pp. 53-62) when the population became numerous and the area of distribution large this form of central government was abandoned.<sup>2</sup>

In most of the colonies the counties grew up as an administrative and judicial division instead of a legislative unit and the evidences of acts of government therein by popular assembly are few. In Virginia, however, ~~where there was~~ no township and very little municipal organization, the people at times took an active part in the county courts. These county courts, following the English example of the close corporation—the closed vestry—till 1662, made no provision for popular activity except in election of burgesses; but in that year, by legislative act, it was made necessary to submit the laws enacted for the county to the people assembled at these general courts.<sup>3</sup> In 1679, however, this privilege was withdrawn and provision made for parish representatives to sit with the justices of the peace to make laws for the county.<sup>4</sup> Thereafter little or no trace of the

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<sup>2</sup> The facility with which the Americans adapted their institutions to their environments is a quality which peculiarly fitted them for the development of a government in harmony with the general welfare. The fact that Rome had not this facility was one of the chief causes of her political decay. The Roman state began with government by popular assembly. When the political conditions became adverse to the successful operation of such a system it still retained the popular assembly with the result that the state was finally governed by the mobs and aggregations of idlers that swarmed about the capital. In America new conditions evolved new adaptations suited to the welfare of the state.

<sup>3</sup> Colonial Laws, 1662, II Henning, 171-2.

<sup>4</sup> Colonial Laws, 1679, II Henning, 441.

use of the popular assembly is found in the Virginia county other than as an electorate.

In States where the borough existed it became merged into the city or the county; if acts of government by popular assembly were ever exercised at all in these this form was abandoned at an early date.<sup>5</sup>

It is probable that in Maryland and in some of the other proprietary colonies where the manor was the local political unit that by-laws were enacted by popular assemblies in the court leet.<sup>6</sup> This system, however, expired at a comparatively early date. With the withdrawal of the political rights of the proprietary, the court leet, in its feudal relation came to an end.

The history of the hundred, in most of the colonies, is little more than the history of a name;<sup>7</sup> except in Maryland it had little or no legislative function. In Maryland, by the act of 1649, the assembly of freemen in each hundred is recognized "as a general folk-moot" with power to enact and enforce local ordinances relating to the common safety.<sup>8</sup> Except where the hundred has assimilated the functions of the township, as in Delaware, it is no more.

In some of our States the parish still remains as a po-

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<sup>5</sup> See Holcom, *Pennsylvania Boroughs*; Allen and Penrose, *Philadelphia*.

<sup>6</sup> See Johnson, *Old Virginia Manors*; Wilhelm, *Local Institutions of Maryland*, p. 28 et seq.

<sup>7</sup> In Delaware the hundred was the name given to the political subdivision similar to the township and became a permanent part of the government. Howard, I, p. 282.

<sup>8</sup> "The hundred of Maryland was a living organism, in character reminding one far more of the institutions in the days of Eadgar than in those of the Stuarts. The 'court' for the election of burgesses or assessors, the assembly for the enactment of by-laws and even the meeting to frame petitions to the assembly or indict an address to the king, each discharged the function of the real folk-moot thus in part supplying the place of a town meeting for the purpose of self-government." Howard, p. 281. See, also, *Local Institutions of Maryland*, p. 39, et seq.

litical organ similiar to the township.<sup>9</sup> At the time of the colonization of America the terms parish and township were almost synonymous in their institutional significance and included both civil and ecclesiastical functions.<sup>10</sup> In New England, where, for economic reasons, the populations were more gregarious, this local organism received the name of town, while in Virginia and the South, where for like reason, the populations were more scattered, it received the name of parish.<sup>11</sup> The industrial conditions of the two sections were different, their politics were different, and their political adaptations varied accordingly. In Virginia the parish became a close corporation, while in North Carolina, South Carolina<sup>12</sup> and Maryland<sup>13</sup> it was representative. Popular assemblies had little or no place in this form of local government except as such assemblies might act as an electorate.<sup>14</sup>

The most important political organisms from the standpoint of government by popular assembly are the (unincorporated) town and the township. Both had a common origin in New England. With the growth of the colonies, the one became adapted to the conditions of urban life and the other to the interests of the rural community. Typical of the early form are Cape Ann, Salem, Plymouth, Duxbury and many of the Connecticut towns.

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<sup>9</sup> The parish in Louisiana corresponds to the county.

<sup>10</sup> In New York the dual character of this primary body was recognized in its organization. The duties of the constable and overseers of the town being different from the duties of the constable, overseers and church wardens of the parish. Howard, I, p. 117.

<sup>11</sup> Henning, I, 122, 125-6.

<sup>12</sup> Local Govt. in S. C., Ramage.

<sup>13</sup> See Parish Inst. in Md., Ingle.

<sup>14</sup> The statutes of Virginia, 1623-4, provide for action of a major part of the freemen of the parish to dispose of corn from the public granary, and by the laws of 1662, the parish was so organized that by-laws could be proposed by the vestry, subject to confirmation of the people.



On their civil side they were organized with direct reference to the industrial interests of the general community; they held their lands in common, in some instances shared in its fruits; they cultivated such fields and occupied such homesteads as were allotted; they enjoyed common pasture, meadow, wood, etc. No one could become a citizen of the town and a participant in its economy without formal action of the freemen. Many of them had a military organization, but this was usually a distinct organism subordinate to the civil power in matters pertaining to administration, although supreme in military affairs.

In New York, also, the village community took root and grew.<sup>15</sup> There the institutions of feudalism had been transplanted from the old world by the Dutch and fostered at a later date by the English under the regime of a proprietary. According to the rules of the Dutch West India Company, all persons who, within four years after giving notice to any chamber of the company, should plant a colony of fifty persons over fifteen years old should be acknowledged as patroons and be "permitted at such places as they shall settle their colony to extend their limits four miles along the shore—that is, on one side of a navigable river or two miles on each side of a river and so far into the country as the situation of the occupiers will permit." The colonists—that is, those who came with the patroons—had no rights of self-government and were required to serve the patroon during the term for which they were bound. The rights granted to the patroons were numerous. The land was granted in perpetual inheritance, together with the "fruits, rights, mines and fountains thereof; a monopoly of the fishing, fowling and grinding," and the lower judicial jurisdictions. Such a polity was not suited to the

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<sup>15</sup> Howard, I, p. 104-6; Elting, Dutch Village Communities.

atmosphere of the new country. It was felt to be oppressive and opposed to the best interests of the company as well as of the colonist. In 1640, in order further to encourage industry, the company granted a new charter, modifying the privileges of the patroons, offering smaller grants of lands to colonists and also providing that in case the settlements of masters and free colonists should increase so much as to become towns, villages and cities that the company would confer municipal privileges of self-government on them. A large number of villages sprang up, and "each village had its 'boueries,' or house lots, its common fields, or pastures, and its folk-moot for the ordering of its domestic affairs." As in the old world during the Middle Ages, self-government in New York had its origin in the free city. After the assumption of government by the Duke of York the charters, patents and privileges of all cities, manors and towns were confirmed.<sup>16</sup>

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<sup>16</sup> Howard, I, 110: The village community was not established in many of the colonies having a predominant feudal polity. In the southern states the economic conditions were unfavorable to the formation of towns and villages. The force of this fact is well illustrated in Virginia. There the first towns—Jamestown and Henricopolis—were soon left to decay, the inhabitants having scattered out on the plantations for the purpose of cultivating tobacco for export. (See Bruce's Economic Hist. of Va., p. 527). In 1617, Jamestown was reduced to five or six buildings. (Id. 530.) "When Yeardley arrived in Virginia in 1619, not only was Jamestown in a state of great decay but Henrico, also, and the adjacent settlements. There were at Henrico a few houses all of which had gone to ruin. \* \* \* The condition of Coxendale and Arrahattock resembled that of the houses of Henrico and Jamestown; there were only six houses in Charles City." (Id. 530). "Under Yeardley's management the population of Jamestown by 1623 was increased to 182. (Id. 531). This year, in order to further encourage building there, every ship arriving in Virginia waters was forbidden to break cargo before reaching Jamestown. This order had little effect, however, on account of evasions. In 1628, the governor and council decided that there was only one way of encouraging town building, viz., by confining the local trading to certain points. (Id. 583). In 1642 Gov. Berkley, under directions from the home government, undertook a vigorous policy of town building. (Id. 534-8). In 1661-2 the general

These communities had settled in open spaces, on grassy areas or abandoned corn fields. But with the growing necessity of the community to clear new lands, with the desire to occupy the rich outlying territory, with the opening of roads and other means of transit and traffic, with the diversity of industry and the consequent growth of commerce and manufacture, individual property and the private initiative came to be of greater advantage. As a proprietary industrial organism the village community broke down; but politically it was retained. In the rural districts it took on the form of the township, in the urban districts that of democratic town government. These are the two forms of government by popular assembly that have come down to us from colonial days.<sup>17</sup> Their history is an interesting one, interesting not only because they are the only survivals of government by popular assembly but also because in these two forms we see in active operation the principles which account for the growth as well as the decadence of this institution.

With the growth of the unincorporated town or village in population and wealth sooner or later a point is reached where government by popular assembly is not

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assembly passed an act requiring all ships arriving in James River to go to Jamestown and the planters to transport their goods thence. Yet in 1675 Jamestown consisted only of twelve or fourteen families (tavern keepers). After the arrival of Culpepper in 1680, an act was passed to lay out towns in the various counties, offering lots at a nominal price, and some twenty sites were selected. This was followed by "An Act for Ports," in 1691. (Id. 556). But with all of these acts and inducements "the only place in Virginia, prior to 1700, to which the name of town could, with any degree of appropriateness be applied, was Jamestown, and even this never rose to a dignity superior to that of a village."

<sup>17</sup> The western school district may also be added to this and possibly some other local organisms but these being a later differentiation they can scarcely be called survivals. They are forms evolved from and often coincident with the township or other local unit.

advantageous. Then it becomes necessary to change the form of government from that of popular assembly to a representative type. We have no better example of this than the city of Boston. "Boston was a town governed by its folk-moot almost from its foundation until 1822, more than one hundred and eighty years. In 1822, when the inhabitants numbered forty thousand, it reluctantly became a city, giving up its town meetings because they had grown so large as to become unmanageable—the people choosing a mayor and common council to do the public business instead of doing it themselves."<sup>18</sup>

In Massachusetts, till 1822, all of the cities, towns and villages were governed by popular assemblies, and that year the Legislature was authorized to charter municipal corporations on application of a majority of the inhabitants of any town having a population of 12,000 or more.<sup>19</sup> Government is still carried on by popular assembly in many of the New England towns, and where the population is not too great this system has been proven by experience to be the most efficient and wholesome. Mr. Henry Loomis Nelson, comparing the New England "town" system with the "incorporated village system" of the Middle, Southern and Western States says:

There is a vast difference, it will be seen, between the constitutions of States which have preserved all the essential elements of democracy and those of States from which the popular assembly has disappeared. There can be no better evidence than is afforded by a comparison of constitutions, that the government of small localities by a remote body like the State Legislature breaks down at the point where the town meeting system is strong. Almost invariably the people who turned over the imme-

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<sup>18</sup> Hosmer, Samuel Adams, the Man of the Town Meeting, p. 18.

<sup>19</sup> Amendment, 1822, Art. II.

diate management of their local affairs to the State have been obliged to curb their agents, and this usually means a limitation upon themselves, for they do not resume the powers they have once delegated.

While town government has been economical [incorporated], village government has been extravagant and inefficient. It must be borne in mind that the village [incorporated] is compared with the [New England] town because the incorporated village of the rest of the Union is most nearly like the New England town in its relation to the citizen. \* \* \* The active participation of the State in the intimate affairs of the localities, which implies the destruction, or at least the serious limitation, of what we call "home rule" has been disastrous. When the legislature possessed the power to grant special charters, political abuses crept in, and some villages were favored at the expense of others. The village finances are managed by officers and trustees, who are usually the party leaders. The tax-payers, having very little control of the administration of their own business, naturally become careless and indifferent. They may grumble occasionally at a large tax rate; and here is a check on the village politician. The man most sensitive to a high tax—he who first resents what he looks upon as an imposition—is usually the smallest property-holder. The small owners are active and belligerent. Theirs is not an ideal kind of opposition to bad government. Their criticism of the local budget is not to be compared with that which is heard at a New England town meeting. They do not compare the amount expended with the work accomplished. They do not see beyond the aggregates of their own tax bills; and so long as these are low they do not take the trouble to inquire very closely what their agents have done or intend to do with the money.

In order to provide for important public works, local debts are contracted. When a New England rural town raises money in this manner its expenditure is jealously scrutinized by the town meeting, and the people are pretty sure to get the worth of the money which they borrow as well as of that which they raise by taxation. [Incorporated] village government being wasteful, debts grow rapidly, and this fact accounts for the constitu-

tional limitations upon the borrowing power. These limitations are directed as well against towns as counties and municipalities; but as the town is a comparatively unimportant entity in the States in whose constitutions the limitations are chiefly to be found, the evils that ought to be remedied are incidental to county and municipal indebtedness.

One of the great evils incident to small municipalities is the power which is in the hands of a few men, generally politicians, to load the town with debt. \* \* \* The (town) system of local government affects not only the amount but the character of the local indebtedness. The returns of the present census on this subject are not yet complete, but they are sufficient to indicate that in this respect the relations of the sections have not materially changed in the decade.

In 1880 the bonded debt of New England was the smallest of any of the four divisions—New England, Middle, South, and Western States. Of all its indebtedness the State debts were about \$2,000,000 less than those of the Middle and Western States and nearly \$90,000,000 less than those of the Southern States. Its county debts were less than \$3,000,000 as against more than \$30,000,000 owed by the Middle States counties, \$24,000,000 in the South, and \$64,000,000 in the West. By far the largest part of its debt was town and municipal. It was very nearly \$126,000,000. A similar state of things existed in the Middle States whose town and municipal indebtedness amounted to more than \$350,000,000. The New England town debt is under the immediate control of the people for whose benefit it is contracted, and who will be obliged to pay it. They have determined the amount and purpose in the town meetings, have fixed the rate of interest, and have watched its expenditure item by item.

A comparison of the subjects for which debts were contracted results, as might have been anticipated, from a knowledge of the training and political habits of the controlling power. The largest expenditures in New England and the Middle States were on account of water works, war expenses, and streets. \* \* \* With a population of about one-third of the Middle States, New England borrowed more than one-half as much as the

latter for water works and public buildings, about as much for sewers, nearly half as much for streets, more than one-third as much for schools and libraries.

By far the most important item in the debt account of the Southern States was for refunding old debts. \*

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Another distinctive feature of the local indebtedness of New England is its more general distribution. A comparatively large part of it is under the control of the people who manage it in their town meetings. The total indebtedness of civil divisions having fewer than 7,500 inhabitants in New England was greater than that of similar divisions of the Middle States. On the other hand, the indebtedness of towns and municipalities having more than 7,500 was not one-third as much.

The conclusion to be drawn from these statistics is apparent. The local indebtedness of New England is contracted for extraordinary expenses,—for permanent and costly works, the benefit of which will be enjoyed and ought to be paid for by coming generations. The ordinary expenses of government—for highways, other than city streets, for ordinary bridges, for schools and libraries—are defrayed as they are incurred, from the annual tax levy. There is very little debt contracted for any of these objects, and next to nothing for the small matters which may be classed as miscellaneous. What extravagance there is in the management of public funds in New England is to be charged to the account of the cities; and yet the city governments of New England are greatly modified for the better by the influence of the town meeting system which they enjoyed before increasing population made necessary the assumption of municipal powers and burdens.

The cities of Worcester, Massachusetts, and Syracuse, New York, illustrate generally the difference between New England and Middle States city governments. In 1880 the two cities were nearly equal in population. They are both manufacturing cities, situated in the interior and surrounded by agricultural communities. In 1880 Syracuse had 92 miles of streets, 17 $\frac{3}{4}$  miles of which were paved. The annual cost of maintaining these highways was about \$35,000. For the same cost Worcester maintained 197 miles of streets, all of which were paved.

The water works of Syracuse were owned by a private corporation and those of Worcester by the city. Syracuse had no parks, unless a small square or two may be thus dignified; Worcester had about 35 acres of parks. The drainage system of Worcester was much more elaborate and perfect than that of Syracuse. While it cost Syracuse from \$10,000 to \$12,000 a year to clean 92 miles of streets, it cost Worcester only \$3,300 to clean 197 miles of streets. The police force of Worcester was larger and more expensive than that of Syracuse. On an expenditure of \$104,896 the New York city maintained 18 schools, in which were taught about 7,000 pupils; the Massachusetts maintained 36 schools, and instructed 9,000 children for \$139,722. The fire department of the one consisted of four steam engines, one fire extinguisher, one hook and ladder truck, and five hose carriages; that of the other had five steam engines, 12 hose carriages, one extinguisher, and three hook and ladder trucks. The annual cost of the first was \$31,589; of the second, \$38,840. A similar story might be told of almost any two cities taken indiscriminately from New England and from any other section of the country. \* \*

When the manner of transacting business in a New England town and its results are compared with those characterizing a New York [incorporated] village, the superiority of the former will be found to be enormous.

In the neighborhood of New York there is a village where dwell much the larger part of the 9,000 people of the township in which it is situated. Its streets are mud holes, its town hall is an ugly, ill-cared-for fire trap, its police and fire departments are inefficient, its expenses are enormous. One thing may be said in its favor—its school buildings are creditable. It is, moreover, a typical suburban village.

The wretched streets of this village—about 20 miles—cost, in 1889, \$11,000. In 1880 the 136 miles of streets of Pittsfield, Massachusetts, cost \$5,000. Pittsfield then had a population of 13,000. The splendid streets of Waltham, in the same State, cost \$12,000. It is impossible to say in what New York village streets comparable to these are found. Waltham's population was 11,712. The roads of Weymouth, with a popula-



tion of 10,570, cost \$6,000. The roads of Woburn, with a population of 10,931, cost \$7,000.

Woburn is nearest like the New York village in population and in propinquity to a large city. Comparison of the remaining items of expenditure will therefore be between the two. The Massachusetts town owns its own water works; the New York village does not. It cost the former much less than \$2,000 a year to light its streets; it cost the latter \$11,000. The New York village owns two school houses, a town hall, and two engine houses; Woburn owned, ten years ago, a town house, an alms house, a town farm and hospital, a library (a gift), seven fire department houses, and 14 school houses. The annual cost of maintaining the schools was about the same in town and village—\$30,000. The cost of the efficient town fire department was \$7,500; that of the inefficient village department was between \$3,000 and \$4,000. The village maintained a police captain and two officers at a cost of \$3,146; the town maintained a chief, three regular officers, eight special policemen for Sundays and seventeen for duty at factories, etc., at a cost of \$4,535.

These facts declare the practical wisdom of the town meeting, and the crudeness and the inefficiency of the corporated village. In New England the body of voters in the town attend the stated March meetings. \* \* \* The warrant for the town meeting notifies the townsmen of the business that will come before them. \* \* \* Each voter has a printed copy of the town report. It contains a minutely itemized account of the expenditures of the past year. These items are criticised and defended by the town. The debate is general. Appropriations are voted. Usually there is a subject which breeds excitement. It may relate to a project for a new school house, to the opening of a new street, to the building of a new sewer. The work that shall be done for the coming year is determined. The manner in which roads and bridges shall be repaired is prescribed. All the business transacted in villages by the board of trustees is done by the townsmen themselves. Everyone knows what is to be done, and how it is to be done. Every one has an opportunity to disclose what he knows of the misfeasance of town officers. \* \* \*

The results of this method in the fiscal affairs of localities and upon the character of the State governments has been indicated as fully as is possible within a limited space.<sup>20</sup>

Turning to the rural township we find that its history has been one of adaptation, growth, and extension. As under primitive conditions, the communal proprietary feature had been adopted as a means of furthering the general welfare, and as, under different political and economic conditions when the interests of the various members of society was most highly promoted by private initiative and private property, the communistic property feature had been abandoned, for the same reason local self-government by popular assembly was here retained. It was of greater advantage, and more satisfactory to all concerned. It, to the highest degree, promoted the general weal; it protected the interests of the members of the local political organism from neglect and from the insidious designs of public agents; it insured the greatest economy in public administration; it furnished a ready means by which the people could at once protect themselves against a wasting of their resources and hold their representatives in more general government to account.<sup>21</sup>

The greater economy of the township system, in those rural parts where the populations are compact and the

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<sup>20</sup> Town and Village Government, Nelson, (Harper's, June, '91), pp. 116-119.

<sup>21</sup> Mr. Bryce, comparing the various forms of local government in the United States, says of the town meeting: "Of the three or four types or systems of local government which I have described that of the town or township with its popular primary assembly is admittedly the best. It is the cheapest and most efficient; it is the most educative to the citizens who bear a part in it. The town meeting has been not only the source but the school of democracy. Again the town meeting has also developed an intelligent, active minded, alert, public spirited people. Participation in public business has induced a patriotic interest."

territorial subdivisions small, appears at every comparison. Its constitutional merit is told by the satisfaction with which it has been retained in the East and the growing favor with which it has been received in the North and West. We have already indicated the constitutional advantage of the system. As pointed out by Mr. Nelson, those State governments which have made the township a part of its structure have been most satisfactory. The six New England States are the only ones of the original thirteen that have had only one constitution each since the establishment of the Federal government.<sup>22</sup> Their constitutions were short and confined to structural provisions and guarantees to the general social state. They were "more fundamental and less particular" than those based on the county. Local interests have needed no other guardians than the people assembled in the town meetings; while in the States not having the town meeting with all its primitive vigor, it has been necessary to load their constitutions with restrictions on the legislature and the powers of local officers. So satisfactory were some of the colonial charters, where the township system was provided for, that they continued to serve as the fundamental law many years after the colonies had gained independence. For example, in Rhode Island the charter of 1663 remained in force until 1842; while the States of the Middle, West and South have been constantly changing their constitutions.<sup>23</sup>

From these New England States the township system

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<sup>22</sup> Mass., 1780; Conn., 1818; N. H., 1792; Ver., 1793; R. I., 1842; Me., 1820.

<sup>23</sup> Alabama has had four, Arkansas four, Florida four, Georgia five, Illinois three, Indiana two, Iowa two, Kansas three, Kentucky four, Missouri three, Nebraska two, New York four, Ohio two, Pennsylvania four, South Carolina six, Tennessee three, Texas five, Virginia five.

These are exclusive of the Constitutions under the Confederacy in the Southern States.

has spread itself over the North and West,<sup>24</sup> through New York<sup>25</sup> and New Jersey,<sup>26</sup> Illinois,<sup>27</sup> Michigan,<sup>28</sup> Wisconsin,<sup>29</sup> Minnesota,<sup>30</sup> Nebraska,<sup>31</sup> and Dakota.<sup>32</sup> It has lately been adopted provisionally by California. In the fertile prairie States several circumstances conspired to make the establishment of the political township easy. In the first place the system of land surveys established by the ordinances of 1785 and 1787 was favorable to it, as by that system the county became settled in small tracts. Another favorable circumstance of this system was that the ordinance gave to each tract of 36 square miles the name of township. Further, in 1790, Governor St. Clair and the judges of the Northwest territory provided for a civil township in this tract for judicial purposes;<sup>33</sup> the act of the general assembly of the Northwest territory, 1802, made provision for a popular assembly by townships for purposes of election,<sup>34</sup> and the United States government had given to the people of each township one section of land,<sup>35</sup> the proceeds of which should be used as a permanent school fund, to give effect to which grant it became necessary to erect a body corporate and politic for school purposes.

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<sup>24</sup> Local Govt. in Mich. and the Northwest, Bemis. Local Govt. in Ill., Shaw.

<sup>25</sup> Rev. Stat. N. Y., 7 Ed. Ch. XI, Tit. II and IV; Laws, 1847, Ch. 197; Laws, 1872, Ch. 513; Laws, 1873, Ch. 46.

<sup>26</sup> See Rev. Stat. N. J.

<sup>27</sup> Rev. Stat. Ill., 1880, Ch. 139, Secs. 1-83.

<sup>28</sup> Howell's Ann. Stat. of Mich., 1882, Secs. 669-717.

<sup>29</sup> Rev. Stat. Wis., 1878, Ch. XXXVIII.

<sup>30</sup> Rev. Stat. Minn., 1878, Ch. X, Secs. 1-35.

<sup>31</sup> Cons. of Nebraska, 1875, Art. X, Sec. 15; Comp. Stat., 1887, p. 32.

<sup>32</sup> Local Govt. in N. W., Bemis, p. 20, note 5.

<sup>33</sup> See Howard, p. 143.

<sup>34</sup> Local Govt. in Mich. and the Northwest, Bemis, J. H. Series, Vol. I; Local Govt. in Ill., Shaw.

<sup>35</sup> Local Govt. in Ill., Shaw, p. 10.

Here, then, was a rudiment of local government. As New England township life grew up around the church, so western localism finds its nucleus in the school system. What more natural than that the local election district should soon be made to coincide with the school township, with a school house for a voting place, or, that justices of the peace, constables, road supervisors and overseers of the poor should have their jurisdiction determined by the same township lines?<sup>36</sup>

These rich prairies were conducive to the development and sustaining of a comparatively dense population, which, being divided territorially into congressional townships only six miles square, could conveniently assemble and transact their public business. There were no difficult mountain ranges to cross as in the Rocky Mountain States, no class lines, still more difficult to get over, as in the South, and the population becoming dense enough to make assemblies of this kind economically possible, from the standpoint of political advantage, they were desirable. The general desire of each citizen to have a part in the management of his own affairs, the wholesome experience of those political communities in which the township had been inaugurated, the economic and political advantage of this form of organization, argue that this institution will ultimately prevail wherever the physical conditions of the country and the social condition of the community are such as will allow of it.

In Illinois the two systems—the township organization on the one hand and the county organization on the other, the New England and the southern local polities—came into competition. The constitution of 1818 and the laws passed under it placed the entire business management of each county in the hands of three commis-

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<sup>36</sup> Ibid. p. 10, 11.

sioners.<sup>37</sup> The population of the State was divided sectionally—that in the southern part coming largely from the South and that in the northern part from the North. The people in the northern part of the State came with their own industrial system and ideas; those in the South came with institutions distinctly their own. A fierce political contest ensued which resulted in the revision of the constitution of 1847. By a compromise between these two sections the legislature was given power to provide for the organization of townships under a general law wherever a majority of the voters in any county should so determine.<sup>38</sup> In the northern part of the State, townships were organized, and the system gradually worked south till at present over 80 of the 102 counties have a township organization.

In Missouri, Nebraska and several other States we may see the same movement in progress. The presence of the negro in the former and the sparsely settled condition of certain portions of the latter have been retarding elements, but, with the political and social forces at work in the former and the development of agricultural science in the latter, we may hope for a complete adoption of the township system in both.

In the South we have both of these obstacles combined. The mountainous portions on the one hand and the peculiar social conditions on the other have caused the county court to be looked upon with greater favor. The natural obstacle may be overcome by industrial development, and the social obstacle will doubtless be overcome by operation of the law of advantage. Not that we would attempt to show that there will be any greater disposition in that or any other section of the country to disregard social distinctions, these distinc-

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<sup>37</sup> Shaw, Local Govt. Ill., p. 9.

<sup>38</sup> Cons., 1848, VII, 6.

tions seem to be drawn more closely every year, but because of the economic and political advantage which the town meeting offers for the selection of suitable officers, and the administration of local affairs where all classes are given a full and free ballot. The superiority of numbers over merit, under the present system,—especially where the secret ballot is enforced; the opportunity at present given to disreputable politicians to work upon the ignorance, the prejudice and the cupidity of the negro and poor white; the ever increasing demand that the affairs of the county shall be managed by the best talent; the greater opportunity which the town meeting will give to the community to avail itself of the counsel and advice of men of sterling merit and general respectability, recommend the township system to this section with great force. Government is coming to be regarded as a matter of business, and as a business man deals with those not of his own special class, as men consider it a matter of first importance in business to be able to meet all on a business level, so in politics, the most enlightened must sooner or later take the business view of public affairs and consider the community in which he lives on the same business level so far as matters touching the public welfare are concerned. This being the present spirit of our institutions, the town meeting is a most fitting instrument by which the most able men of the community may be called into its service. For this reason the township system recommends itself as the future local polity of the South, as well as of the North and West.

As to the Rocky Mountain division, and the arid plains on either side, it may be many years before this territory has been so far recovered to an active industrial population as to warrant the introduction of such a system.

The township system has been a product of the laws of advantage; it has been developed and maintained on

economic principles. With the increase of population and the expansion in the volume of business there comes a time when it is felt that the county government fails to reach the extremities of the body politic; when there seems to be need of a smaller governmental district in order that the opportunity may be afforded for the more intimate participation of every citizen in the management of domestic affairs. Then begins an agitation for township organization which sometimes develops into a long and sharply contested struggle. No doubt inherited prejudices usually constitute an important element of the conflict, but it is fought out mainly on economic grounds. Will not the new government, on account of the multiplication and reduplication of offices, be much more expensive than the old? Will the new board of supervisors—a local legislature, sometimes composed of many members—be able to administer public affairs as promptly, intelligently and honestly as the commissioners? Does not the present system favor the city at the expense of the country and will not the change destroy the official monopoly of the “court house ring?” These are some of the considerations which have weight at the polls.

The history of Nebraska affords an excellent example of the economic rivalry of local organisms. When the territorial government was established in 1854, the county was chosen as the political unit; and under the constitution of 1867 the same system was continued. Not till 1875 was the first definite step taken toward the substitution of the township-county plan. In the constitution of that year the legislature, following the Illinois precedent, was authorized to frame a general township act whose adoption should be left to the voters of the respective counties. Thereafter at each session of the legislature attempts were made to create a township law; but only in 1883 was it accomplished. And in the



five years which have since elapsed but twenty-four out of the eighty-three organized counties of the State have put the law in operation.

The result shows conclusively that the sources of population had little to do with the matter. The feature that recommends the system, which makes it of such great advantage in small political divisions, both urban and rural, is the "town meeting," the element of government by popular assembly. By virtue of this each citizen becomes active minded, intelligent, public spirited. He knows not only the general policy of his local government, but also every detail of its administration. When the town meeting is called together printed and itemized accounts of expenditure are placed in his hands. He not only has an opportunity to criticize any element of expense and make his objections known and felt, but in passing on the budget for the next year to limit the expense and then, in the exercise of his right as elector, to choose such officers as may be relied on to push the policy, there determined upon, into effect. The force of this principle, the policy of this democratic institution, is felt not only in all the township itself, but also in the county and the State.<sup>39</sup>

"How powerful," wrote Thomas Jefferson, "did we feel the energy of this organization in the case of Embargo! I felt the foundations of government shaken under my feet by the New England township. There was not an individual in these States whose body was not thrown with all its momentum into action; and though the whole of the other States were known to be in favor of the measure, yet the organization of this little selfish minority enabled it to overrule the Union. What would the unwieldy county of the Middle, the South and the West do? Call a county meeting; and the drunken

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<sup>39</sup> Howard, I, 150-1.

loungers at and about the court houses would have collected, the distances being too great for the good people and the towns generally to attend. As Cato, thus concluded every speech with the words, *delenda est Carthago*, so do I every opinion with the injunction, 'divide the counties into wards.' "<sup>40</sup>

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<sup>40</sup> Jefferson to Saml. Kercheval, July 12, 1816, Writings, Vol. VII, p. 13.

## CHAPTER IV.

## GOVERNMENT BY DELEGATION, OR REPRESENTATIVE DEMOCRACY.

Representative government is the result of the operation of the law of "the survival of the fittest." In the struggle for supremacy it became advantageous for the local political groups to unite. It was by broad co-operation that conquest was made possible. The vicus, the village community, the independent industrial group having been reduced to subservience, it was by a still broader industrial co-operation that the rule of conquest was broken and government based on the general welfare established. In the organization of the civil power on this broader basis of co-operation, the empire, the State, and in many cases the city was found too large and unwieldy to be governed by popular assembly, while organization according to the polity of conquest proved disastrous.<sup>1</sup> Representative government, therefore, became a political and economic necessity.

Guided by the experience and precedents of the past, accepting the logic of their own history, the people of the United States and of the several federated States, chose the representative form of government.<sup>2</sup> As a political people, possessed of the sovereign power, they met and formulated a plan of permanent political organization; by solemn political act they adopted a sys-

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<sup>1</sup> The most notable examples of this are the Roman Empire and Spain. The Dutch Republic also suffered for the same reason.

<sup>2</sup> This refers to the more general structures, and not to the local units. Many of these, as already shown, are not representative to any considerable extent.

tem of government whereby they ceded to the corporate agencies which they had created certain well defined portions of this sovereignty. Having, by general co-operation, constructed a frame of government and provided it with all means of safety and of action, they retained to themselves the right to choose its officers and agents, to change its form and structure whenever they deemed it expedient, and also to participate in certain acts of legislation and administration.

The general plan adopted by the people of the United States, in 1787-89, for their political organization was tri-partite in form. It provided; first, for the organization of a federal government by the people of the United States having certain of the more general powers which were to be exercised over and in behalf of all of the people of the United States; second, for the organization of separate State (or commonwealth) governments, by the people of the several States, having certain other sovereign powers not already ceded to the federal government, which were to be exercised in the interest of all of the people of the particular State; third, for the organization by the government of the State of political subdivisions within the State, for the exercise of certain sovereign powers over the people of particular subdivisions.

In the organization of this federal plan, the people of the United States especially provided that all power not specifically granted to the government of the United States should be retained by the people of the respective States; and in the organization of the State governments the people of the respective States have retained many powers which were not delegated to their corporate agents. It has been found by bitter experience that the representative, the public agent, when too far removed from his constituency, is apt to lose sight of the prime purpose of his appointment—the public welfare—and instead of discharging the trust by the people imposed

like the predatory leader, is prone to seek his own highest welfare regardless of the injury done to the public. The industrial State, having extended its units, having given greater scope to co-operation by the formation of a federation, having organized a broad representative government, presents to the statesman the following problems:

How can these representatives be made responsive and responsible to the people?

How can these political organs of the State, too large to be economically managed by popular assembly, be made to perform the functions of government in the interest of the people?

How can the people prevent predatory combinations getting control of the government?

How can the people insure the protection of their own interests against the infidelity of its agents?

In their attempts to make solutions of these problems, four constitutional devices have been employed, whereby the people may exercise powers directly without entrusting them to agents or representatives.

In the first place they have reserved the right to alter and abolish their system of government, wherever it may prove unsatisfactory, and to erect another in its stead.


In the second place, they have, in a large measure, reserved to themselves the right to fill the offices created by them in the established government.

In the third place, they have preserved to themselves the right of peaceable assembly and petition, and in many cases provided a means whereby they can initiate measures and impress the popular will on the government.

In the fourth place, they have provided for co-operation in legislative and administrative acts of representative government by means of the referendum.<sup>2</sup>

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<sup>2</sup> The referendum has been defined by Ellis Paxton Oberholtzer as "The submission of laws, whether in the form of



The referendum is not, as has been supposed by many, opposed to the principles of representative government, on the other hand representative government is both the cause of and the condition precedent to its employment. It is a device employed, in a political organism too large to be governed by popular assembly, whereby the acts of the representatives or agents of the people may be submitted to them for ratification before they become valid or binding.

Strictly speaking, from our point of view, the formation and adoption of a constitution is not an act of government. It is the act of the sovereign people engaged in the formulation of their plan of government, making provision for a political establishment which will exercise the sovereign functions—the appointive or elective, the legislative, the judicial and the executive and administrative powers.<sup>3</sup>

These functions of government are only exercised under and according to the constitution so established. The appointment and election of officers, legislation, adjudication, and the execution and administration of laws are acts of the corporate organs and governmental agencies created by the people in the formation and adoption of constitutions. Acts of government, in other words, follow the constitutional formations. The adoption of a

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statute or constitution, to the voting citizens for their ratification or rejection, these laws having been first passed upon by the people's representatives assembled in legislature or convention."—*The Referendum in America*, p. 9.

<sup>3</sup> It seems to the writer that the old classification of government into executive, legislative and judicial, is not complete, that to this must be added at least one other class of functions, that of providing for the succession; the election or appointment of officers to fill the offices, to operate these corporate organs provided for the exercise of the functions of government. This is especially helpful in so-called popular government where the people take so large a part in elections and where we have specialized organs of appointment, such as civil service commissioners, the president and senate, the board of appointments as in New York under the first constitution, etc.

constitution could be understood as an act of government only in the same sense as the building of a cotton factory and equipping it with machinery is a part of the process of manufacturing muslin. We have chosen to regard it as a constituent act preparatory to the exercise of the functions of government. The constitution is the fundamental law, that is, it is the law that underlies and controls all other law. The fundamental law is the act of a constituent body; the statute law is the act of a creature of this constituent body.

We have called attention to the plan of government established by the people of the United States in 1787-89 as embodying the principles of popular co-operation in representative government. This may be in a degree misleading, as we are making an evolutionary study that has to do with the whole institutional life of the nation. At the time of our federal establishment popular co-operation was not as extensively employed as it was many years later; at that time we had just broken away from the forms of monarchy and absolutism; popular government was in its infancy and all its applications were involved in experiment. In the very nature of things it could not be otherwise.

In the first place, those political establishments organized immediately after the breaking down or withdrawal of British authority were in the nature of provisional or revolutionary governments; they rested their sovereign rights largely on the exigencies of war. The conventions or congresses which framed these governments were not constituent assemblies of the people or of delegates chosen for that purpose. The members were officers of committees of safety, temporary governing bodies resting their authority in public opinion and necessity.

The governments established were *defacto* and not *de jure*. Not legitimacy, however, but a means of exercising sovereign power, a means of united action, was

the element at that time most desirable.<sup>4</sup> Therefore the ordinary or provisional governing bodies, or "committees of safety," were given or allowed to assume full power, without being encumbered by considerations of political theory.

In the second place, theories of constitutional government were for many years in dispute. Many of the first constitutions were adopted by the same processes as ordinary legislation, and in fact the distinction between a constitution and an act of the legislature was not understood. In *Thomas vs. Clusley Daniel*, 2 McCords, R. 354, the court decided that the first two constitutions of South Carolina were merely ordinary statutes.<sup>5</sup> The same may be said of the Articles of Confederation<sup>6</sup> and of the first constitutions of all of the colonies<sup>7</sup> except Massachusetts and possibly Delaware.<sup>8</sup>

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<sup>4</sup> Sovereignty in such a country as our own is regarded as "the power of the people in its highest dignity and greatest force"—the state, as "the embodiment and personification" of this highest power. Legitimacy, therefore, is not the test of sovereignty or of statehood. It is highly desirable, in fact it is necessary, to the protection of those interests for which the state is organized, that this sovereignty be exercised according to forms of law; and in altering the form and structure of government it is desirable that this be done in some predetermined manner; but where there is no rule of law, or where the ordinary means of constitutional change is interfered with by force, then the rule of progress demanding that this highest power of the people be exercised in such manner "as to them shall seem most likely to effect their safety and happiness," supersedes the rule of the law. In case the rule of law, established in government, does not make provision for the orderly modification of institutions according to the rule of progress, then the sovereign power may make a rule of law that will provide for such modifications, or, being unable to modify the rule of law, in revolution to establish a new rule of law—a new government.

<sup>5</sup> Ramsay's *History of the Revolution in S. C.*, p. 128-9; Cf. Jameson, Sec. 136.

<sup>6</sup> These articles were in the nature of treaties and therefore within the powers of the legislature.

<sup>7</sup> Within this class fall the following constitutions: N. H., 1776; S. C., 1776 and 1778; Va., 1776; N. J., 1776; Penn., 1776; Md., 1776; Ga., 1776; N. C., 1776; N. Y., 1777.

<sup>8</sup> "Here was a convention called by the legislative assembly of



In the third place, after the breaking away of the colonies from the ancient monarchical forms, the fiction of sovereignty in its relation to the politically organized people was yet to be evolved. The principle that governments derive their just powers from the consent of the governed; that whenever any form of government becomes destructive of the public welfare "it is the right of the people to alter and abolish it and to institute new government, laying its foundations in such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness," was well understood and generally accepted. But who are the people, and how can they exercise this right so as to give it the sanction of law? These were questions that it took many years to solve. Were those provisional governments which had been organized prior to and during the inception of the war for independence the politically organized people for the purposes of establishing and modifying government? Reason, expressing itself through the courts, answered the question in the negative. On board the Mayflower at the time of the formation of the fundamental compact of the Plymouth colony, and in those colonies where their first constitutions were framed by popular assembly, were found examples of a politically organized people. These popular bodies in their organization for the consideration and adoption of a plan of government stood out as historic examples of a politically organized people for the purpose of constitution making. Who, then, were the politically organized people under circumstances where it was impossible for them to assemble in one convention and organize for this purpose? Does the fact that they

the existing government, by an act making careful provisions for a fair election, and, as may be inferred, elected for the express and only purpose of framing a constitution. Confining itself, probably, to this limited function, it was strictly a constitutional convention." Jameson, Sec. 143.

meet in different places and appoint a committee of delegates to assemble and formulate a plan for them and then report back this plan for adoption materially change the essential nature of their organization? Is the relation essentially different when these delegates are empowered to both formulate and adopt the plan? It was long thought that these delegates were the politically organized people. The debates of constitutional conventions of the first half of the national period are full of expressions of this view. Mr. Livingston, in the New York convention, 1821, declared, "The people are here themselves; they are present in their delegates,"<sup>9</sup> and by Mr. Peters in the Illinois convention in 1847, "We are the sovereignty of the State. We are what the people of the State would be if they were congregated here in one mass meeting. We are what Louis XIV. said he was, 'We are the state.'"<sup>10</sup> The same error was made by Hon. Wm. L. Yancey in the Alabama convention of 1861. The question being on the submission of the proposed constitution, the ordinance of secession, he said:

This proposition is based on the idea that there is a difference between the people and the delegate. It seems to me that this is an error. \* \* \* The people are here in the persons of their deputies. Life, liberty and property are in our hands. Look to the ordinance adopting the constitution of Alabama. It states, "We, the people of Alabama," etc., etc. All our acts are supreme without ratification, because they are the acts of the people acting in their sovereign capacity.<sup>11</sup>

But, as stated by Mr. Bergeaud:<sup>12</sup>

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<sup>9</sup> Proceedings and Debates of the Convention of 1821, p. 199.

<sup>10</sup> Illinois State Reg., June 10, 1847.

<sup>11</sup> Hist. Debates, Alabama Convention, 1861, p. 114 Cf.—Jame-son, Sec. 312.

<sup>12</sup> Adoption and Amendments of Constitution, p. 184.

In the United States the constitutional convention acts within the limits of its mandate. The legislature is the permanent representative of the people. The convention is a ~~special committee~~ of delegates. These delegates may have received, in general terms, the command to revise the constitution. In this case they are free to submit to the electors whatever plan they may deem fit, provided this plan contains nothing contrary to the federal constitution. But they may also have been given the special task of revising only certain parts of the constitution. In this case they are bound absolutely by the act of the legislature, which has specified the points toward which their acting may be directed, and in consideration of which the people have conferred upon them their mandate. Their full power extends to this point and no further. If they were to go beyond it they would be placed in a position analogous to that of the legislator who has enacted a law contrary to the constitution. The legislature has received from the people the right to act within the limits traced by the constitution. Let it once pass beyond these limits, and it ceases, in so far, to be a legislative power. The law thus made is without constitutional value, and may be attacked in the courts. It is true that, in the case of a convention, the power which may legalize the transgression is close at hand. If the electors, called to decide upon the fate of a constitutional amendment proposed by an assembly which possessed no right to formulate such an amendment, sanction it, it becomes a part of the constitution. But that does not render the act by which it has been submitted to the people any less illegal. The legislature would have been justified in requiring the government, whose duty it is to conduct the voting, to refuse to take it.

Any validity given to such a constitutional modification would come from the action of the people—the right which they have to alter and change their plan of government—and not from any inherent right or power which the delegates possessed. Using the same opinion as that quoted by Mr. Bergeaud:<sup>13</sup>

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<sup>13</sup> Wood's Appeal, 75 Penn. St. Records, p. 71.

A convention has no inherent rights; it exercises powers only. Delegated power defines itself. To be delegated it must come in some adopted manner to convey it, by some defined means. This adopted manner therefore becomes the measure of the power conferred. The right of the people is absolute, in the language of the Bill of Rights, to alter, reform or abolish their government in such manner as they may think proper. This right being theirs, they may impart so much or so little of it as they shall deem expedient. It is only when they exercise this right and not before, they determine, by the mode they choose to adopt, the extent of the powers they intend to delegate.

No illustration appears to give this greater clearness than the constitutional provision made for amendment, by legislative action entirely, ~~without reference~~ to the people. For example, the constitution of Delaware<sup>14</sup> provides that "The general assembly, whenever two-thirds of each house shall deem it necessary, may, with the approbation of the governor, propose amendments to this constitution, and at least three, and not more than six months, before the next general election of representatives, duly publish them in print for the consideration of the people; and if three-fourths of each branch of the legislature shall, after such an election, and before another, ratify the said amendments, they shall be valid to all intents and purposes as a part of this constitution." For this purpose the members are not representatives, i. e., legislators, but delegates, with specifically defined powers, and they can bind the political State only by following those prescriptions specifically. A manner is here prescribed by the people whereby the delegates may amend or reform the constitution without referring the amendment to a vote of the people. And in case they should pursue any other manner or attempt to do any other thing, then their act would be absolutely void.

<sup>14</sup> Const. 1831 Art. IX.

The politically organized people being the sovereign, that political organization must exercise itself in order to establish, alter or abolish government, or not having exercised itself, tacitly submits to usurpation. The people of the United States have come to realize this fact in the adoption of their constitutions.

In the fourth place, the representatives themselves, in the early period, were close to the people. The delegates to the early constitutional conventions, as well as the representatives to legislative assemblies, came from the town meeting, the plantation, the local community. The interests of the people and of their agents were common, and they did not feel the necessity of imposing constitutional restrictions and of making constitutional provisions for active co-operation in acts of government.

In considering the development of popular co-operation in representative government, we will employ the classification first above indicated: taking up first, the evolution of popular co-operation in the formation and adoption of the constitution; second, the evolution of popular co-operation in appointment and election of governmental agents; third, the evolution of popular co-operation in government by means of peaceable assembly, petition, etc.; fourth, the evolution of popular co-operation in ordinary acts of legislation and administration by means of the referendum.

## CHAPTER V.

## POPULAR CO-OPERATION IN THE ADOPTION AND AMENDMENT OF CONSTITUTIONS.

It is a remarkable fact of American history that nearly all of our fundamental political establishments have been made by contract or compact. Prior to the colonization of America the notion that government was the result of compact among the governed had its foundation in theory only. To be sure the medieval municipalities and some of the minor political organisms had been erected on this foundation, but the contractual theory had little to support it. The prevailing polity, prior to the American colonial period, had been that of arbitrary power—a polity which primarily had no regard for the consent of the governed. No circumstance is better evidence of the essentially different polity and purpose of American political establishments than that the government from the first was based on contractual device. The charter granted to the primitive colonial corporation, the patent to the proprietary lord, and the compact of the voluntary association, were the primary institutional foundations here; the subsequent royal charters, articles of confederation and constitutions were of the same contractual nature.

Looking to these contracts as the constitutional basis of powers, the growth of democracy, i. e., of the co-operation of the people in our government, becomes a subject of absorbing interest. In charter grants and patent rights the King was regarded as the source of all power, as the prototype of the State, the embodiment of the rights of the people as an organic whole, and the stock company and proprietary were looked upon as his

creatures. The contract, in such cases, was between the King, as the representative of the rights of the people, and the representatives of the King. But when the King was absent or was opposed to the interests of the people, it then became necessary for the people to contract with themselves, to form a social compact, as to the agencies of government. The first instance of this kind that was felt by the institutional world was in the Plymouth colony at the time of the formation of the fundamental compact.<sup>1</sup>

As the first legislative bodies in several of the colonies were popular assemblies, so the first constitutional convention was a congregation of the people. The constituent assembly of the Plymouth colony, as well as the constitutional conventions of the Rhode Island and New Haven colonies, were of this character.<sup>2</sup> But the "body politic" in all of the colonies soon became too large and unwieldy, too widely distributed, to meet conveniently—to organize themselves politically in popular convention, and then and there agree upon the structure and powers of government. The people, therefore, in the formation of their constitutions, from necessity resorted to the

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<sup>1</sup> See *supra*, p. 43—In this case the King and the King's corporation were absent.—Also *supra*, Ch. II, p. 51.

<sup>2</sup> The Plymouth compact was one of the most general nature. It did not provide for the structure of the corporate agents of government. It did not provide for a grant and apportionment of sovereign powers. It was simply a fundamental compact whereby they did "by these presents" "solemnly and mutually, in the presence of God and one another \* \* \* covenant and combine (themselves) together into a civil Body Politic, for the further Ordaining and Preserving and Furtherance of the Ends aforesaid; and by virtue hereof enact, constitute and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony." They left both the structure of corporate agents and the powers, to subsequent acts of the "body politic" so formed. New Haven, however, formulated a constitution that was separate from the people—which determined on both the general structure and powers.

principle of representation in constitution making; they chose delegates whom they empowered to act for them. In some cases the powers granted by the people to these delegates were of such nature that their acts in convention were made binding upon the body politic without further sanction; in other cases the powers of the delegates were limited to the formation of a fundamental charter which was to be referred to the people, or to their representatives, for adoption or rejection. Thus, in 1643, the articles of union framed by the United Colonies of New England were referred back to the people of New England for approval.<sup>3</sup> In 1777 the Articles of Confederation were referred to, and later ratified by the several colonial legislatures; in 1787 the constitution of the United States was referred for ratification to constituent conventions to be held in the various States.

The referendum was, however, little employed in the adoption of the early State constitutions. But, with the establishment of the first legitimate governments, we find a manifest desire on the part of the people, in those States where the town meeting prevailed, to participate directly in the formation of the constitution. The principle that governments derive their just powers from the consent of the governed was a sacred one. It having become an impossibility for the people as a corporate unit to get together, agents or representatives being necessary for the purpose of formulating some constitutional plan, it follows that any action on the part of the people compatible with the principle of representation must be by the referendum. So practical has the plan proven, and so wholesome in its effects, that from this humble beginning it has now become the general method, in fact, the only legitimate method of adopting constitutions in all States but three. The evolution of

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<sup>3</sup> Bancroft, I, p. 289-94; McCracken, *Swiss Solution of American Problems*, Copley Square Series, p. 14.



Table Showing Time and Manner of Adopting Constitutions.

	1770-80	1780-90	1790-00	1800-10	1810-20	1820-30	1830-40	1840-50	1850-60	1860-70	1870-80	1880-90	1890-00	Constitutions Submitted to a vote of the People.
Constitutions adopted without a popular vote	-78- *Mass. -79- *N.H.	-80- Mass. -83- *N.H.	-91- N.H. -92- Ky. -96- Tenn. -99- Ky.		-17- Mass. -18- Conn. -19- Me.	-21- N.Y. Mass. -24- *R.I. -29- Va.		-32- Mass. -34- Tenn. -35- Mich. -37- Penn. -39- Ga.	-41- R.I. -42- *R.I. -44- R.I. -45- N.J. -46- La. Tex. -46- N.Y. *Mo. Ia. Wis. -48- Ill. Wis. -49- Cal.	-50- Va. Ky. Mich. -51- Ind. -52- La. -53- *Del. *Mass. -55- Kan. -57- Ia. Kan. Minn. Ore. -58- Kan. -59- Kan.	-62- *Ill.-W.Va. -63- Nev. -64- Md.-La. *Ark.-Nev. Colo. -65- *Ga.-N.C. *Miss.-Md. *Cal. -66- *N.C.-Tex. Neb. -67- *N.Y.-Md. Ala.-Mich. -68- S.C.-Ga. N.C.-La. Miss.-Ark. Fla. -69- Tex.	-70- Tenn. Ill. -72- Penn. W.Va. -74- *O. Ark. -75- Ala. Mo. Tex. Neb. -76- Colo. -77- Ga. -79- La. Cal.	-85- Fla. -89- Ida. Mont. Wyo. S.Dak.	-90- Miss. -91- Ky. -94- N.Y. -95- N.Dak. Utah.

Submitted to the Legislatures of the States; \* Passed by the Legislature as ordinary legislation; † Ratifying Conventions; ‡ Rejected by the People; § Three different ones submitted; †† Rejected by Congress; ‡‡ Ratified also by an adjourned session of Conv.; ‡‡‡ Several secessions of Consts.

the referendum in the adoption of constitutions is shown in the table opposite; those constitutions adopted without submission to popular vote appear in the table below the double diagonal line, while those which were submitted to the people are shown above it.

In making a comparison by decades from 1770 to 1890 it will be found that there has been a very decided increase in the use of the one method, and a very decided decrease in the use of the other:

Decades	1770 -80	1780 -90	1790 1800	1800 -10	1810 -20	1820 -30
By referendum	2	2	4	0	3	4
By Representatives	14	16	5	1	4	0

Decades	1830 -40	1840 -50	1850 -60	1860 -70	1870 -80	1880 -90
By referendum	5	13	14	33*	14	7
By Representatives	3	0	2	11*	0	0

\*Including the secession constitutions and those of the reconstruction period rejected by Congress.

Eliminating from the list the ordinances of secession and those rejected by Congress, and taking periods of thirty years, we have the following results:

Periods	1770-99	1800-29	1830-59	1860-89
By referendum	8	7	32	50
By Representatives	35	5	5	0

These facts, together with the fact that of the thirty-five constitutions adopted during the last thirty years only three have been by any other method than by the referendum, it would appear, even without express provision in the various constitutions, that this method of procedure would have become the settled law of the land.

## II.

Having shown the evolution of popular co-operation in the adoption of constitutions, we now turn our attention to the provisions made for their amendment.

The history of the constitutional amendment presents several distinct phases of development. In the early part of our national history the chaotic condition of government and of American political ideals appear in the fact that nine of the early constitutions<sup>4</sup> made no provision whatever for the modification of their structure in such matters as seemed best suited to the shifting social and economic conditions.<sup>5</sup> In eight others provision was made for amendment, but no prescription is found for submitting amendments proposed to a vote of the people.<sup>6</sup>

The New England States recognized the principle of change, and also the principle that government should be established and changes in the fundamental law made by co-operation of the political people. The former principle appealed to them as a matter of necessity, and their whole political life had been founded on the latter. Their training in industrial organization, in the township, in the city, and the traditions that they had brought with them from England, established this in their minds

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<sup>4</sup> New Jersey, 1776; New York, 1777; Ohio, 1802; Pennsylvania, 1790; South Carolina, 1776; Tennessee, 1796; Virginia, 1776, 1830 and 1850. The same fact appears in two of the "carpet-bag" or reconstruction constitutions, viz., Georgia, 1865; Virginia, 1864.

<sup>5</sup> In none of the states having township systems were these provisions omitted. They are all either southern or middle states.

<sup>6</sup> These states were Delaware, 1792, 1831; Florida, 1838; Georgia, 1798; Maryland, 1776; Missouri, 1820; South Carolina, 1778 and 1790. To these may be added the reconstruction constitution of South Carolina, 1865. It may be noticed also that none of the states had the town meeting system.

as a political ideal from which they could not depart. But their experience was limited, and precedents for written constitutions were few. They knew little of any means of reaching the people other than by local assemblies or through their representatives or delegates in convention, or legislative assembly. As it was desired to consult the popular will, and at the same time to have some means of making modifications demanded by the progress of political and economic necessity, six State constitutions<sup>7</sup> made provision for what has since been known as a Council of Censors—a body independent of the government itself, having powers of supervision and also of recommending changes in the plan of government. ~~Their chief constitutional~~ function was that of calling conventions for the purpose of considering amendments proposed.<sup>8</sup> This experiment, however,

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<sup>7</sup> Constitutions of New Hampshire, 1784, 1792; Pennsylvania, 1776; Vermont, 1777, 1786, 1793.

<sup>8</sup> The provision for the Council of Censors in Vermont is as follows:

"In order that the freedom of this Commonwealth may be preserved inviolate forever, there shall be chosen by a ballot, by the freemen of this state, on the last Wednesday in March, in the year one thousand, seven hundred and eighty-five, and on the last Wednesday in March, in every seven years thereafter, thirteen persons, who shall be chosen in the same manner as the council is chosen—except they shall not be out of the Council or General Assembly—to be called a Council of Censors; who shall meet together on the first Wednesday of June next ensuing their election; the majority of them shall be a quorum in every case, except as to calling a convention, in which two-thirds of the whole number shall agree; and whose duty it shall be to inquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of the government have performed their duty as guardians of the people; or assumed to themselves, or exercised other or greater powers than they were entitled to, by the constitution. They are also to enquire whether the taxes have been justly laid and collected in all parts of this commonwealth—in what manner the public monies have been disposed of, and whether the laws have been duly executed. For these purposes they shall have power to send for persons, papers and records; they shall have authority to pass public censures—to order impeachments, and to recommend to the

proved unsatisfactory and was afterward abandoned. Massachusetts did not employ the device of a Council of Censors, but provided for amendment by convention, the initiative to be taken by the people. Art. X, Chapter VI of the Constitution of 1780<sup>9</sup> is as follows:

In order the more effectually to adhere to the principles of the constitution and to correct those violations which by any means may be made therein as well as to form such alterations as from experience shall be found necessary, the general court which shall be in the year of our Lord one thousand seven hundred and ninety-five, shall issue precepts to the selectmen of the several towns and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution, in order to amendments.

And, if it shall appear by the returns made that two-thirds of the qualified voters throughout the State who shall assemble and vote in consequence of the said precepts are in favor of such revision or amendment, the general court (legislature) shall issue precepts, or direct them to be issued from the secretary's office to the several towns to elect delegates to meet in convention for the purpose aforesaid.

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legislature the repealing of such laws as appear to them to have been enacted contrary to the principles of the constitution. These powers they shall continue to have for and during the space of one year from the date of their election and no longer. The said Council of Censors shall also have power to call a convention to meet within two years of their sitting, if there appears to them an absolute necessity of amending any article of this constitution which may be defective—explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people; but the articles to be amended and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."

<sup>9</sup> Poore's Charters and Constitutions, p 1865.

And said delegates to be chosen in the same manner and proportion as their representatives in the second branch of the legislature are by this constitution to be chosen.

Her example was followed by Kentucky,<sup>10</sup> Ohio,<sup>11</sup> Louisiana,<sup>12</sup> Mississippi,<sup>13</sup> Maryland,<sup>14</sup> Florida,<sup>15</sup> and Nebraska.<sup>16</sup> The convention, however, was found to be an unsatisfactory means of making slight changes in constitutions. It was too cumbersome, too expensive, and in some cases the machinery for calling the convention was so complex as almost completely to preclude the making of amendments which seemed necessary, but which did not call for an extensive revision. The constitution of Kentucky, 1850, is a notable example of this kind. It provided that—

When experience shall point out the necessity of amending the constitution, and when a majority of all the members elected to each house of the general assembly shall, within twenty days of any regular session, concur in passing a law for taking the sense of the good people of this commonwealth as to the necessity and expediency of calling a convention, it shall be the duty of the several sheriffs and other officers of elections, at the next general election, \* \* \* to open a poll for and make return to the Secretary of State \* \* \* the names of all those entitled to vote for representatives who have voted for calling a convention; and if thereupon it shall appear that a majority of all the citizens of the State entitled to vote for representatives have voted for calling a convention, the general assembly shall, at their next session, direct that a similar poll shall be opened and return made for the next election of representatives; and if thereupon it shall

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<sup>10</sup> Cons. 1702, 1799 and 1850.

<sup>11</sup> Cons. 1802.

<sup>12</sup> Cons. 1812.

<sup>13</sup> Cons. 1817.

<sup>14</sup> Cons. 1851.

<sup>15</sup> Cons. 1865.

<sup>16</sup> Cons. 1867.

appear that a majority of all the citizens of this State entitled to vote for representatives have voted for calling a convention, the general assembly shall, at the next session, pass a law calling a convention.

After making these provisions for taking the sense of the voters at two general elections, and after requiring that at each election a majority of all the voters in the State should be in favor of a convention, then another election was to be had for the election of delegates before the convention could be assembled. The result was that though there was urgent reason for amending the constitution of 1850 and though several attempts were made, yet at one or the other of these preliminary elections the number of voters would be too small to meet the constitutional requirement, and the amendatory organs could not be set in motion. Therefore the constitution was not amended. This method was employed in the Florida constitution of 1865, as may be inferred from all the circumstances of the convention which made it, for the very purpose of making amendment most difficult, and of precluding other and more popular means of amendment.

Generally speaking, however, it may be said that the original purpose was not to make the amendatory process so cumbersome. The rigidity of the device is accounted for on the ground that the people of the various States did not wish to have their constitutions too readily changeable; that though they wished to have their statute law quickly responsive to the popular will, the good order of the country demanded that the structure of government and the fundamental law be not changed to meet the whims of political factions and leaders; that above all things they demanded stability and order. At the same time they wished to make all provisions for change, for adaptation to progress, that were wholesome. They therefore resorted to experiments.

One of their first experiments was a constitutional convention to be called by a Council of Censors; another was that of confining the amendatory process to a convention of constituent delegates to be called by the people as set forth above. Both originated in the notion that change in government should not come through those in power—the existing government. Both of these experiments proved unsatisfactory, and were afterward abandoned for better devices. With all the imperfections of these means for reaching the end in view we are indebted to the New England States—the home of the town meeting—for the part which they took in distinguishing constitutional from the other forms of law, and for their insistence on the rights of the political people in the establishment of their government.

The device which was finally evolved from this early experience was that wherein the legislature was employed in the capacity of a constitutional assembly for the purpose of initiating an amendment, thereby doing away with the necessity of a separate convention. This device has taken several forms. In Connecticut, by the constitution of 1818, article XI, it was provided that “whenever a majority of the house of representatives shall deem it necessary to alter or amend the constitution they may propose alterations or amendments; which proposed amendments shall be continued to the next general assembly,” but provided that each house might act on its final passage. In Massachusetts (1820) another eccentricity appears in the form of a provision requiring a majority of the senate and a two-thirds vote of the house to formulate an amendment. It would seem that in Connecticut the house was preferred as the most suitable body for initiating an amendment, because it was closer to the people, while in Massachusetts a two-thirds vote was required of that body and only a majority in the senate, because the senate was the more con-



servative. Omitting, however, these two "sports," we may classify provisions for amendment where the legislature serves in the capacity of constituent delegates as follows:

First, those providing for amendment (1) by legislative initiative, (2) publication, (3) a second legislative action, (4) a second publication, (5) a vote of the people.

Second, those providing for amendment (1) by legislative initiative, (2) publication, (3) vote of the people, (4) a second legislative action.

Third, those providing for amendment (1) by legislative initiative, (2) publication, (3) a vote of the people.

There may be some sameness in point of the details of publication and of legislation, but the essential difference appears in this—that in the first there are two legislative acts by two separate legislatures required before submission to the people; in the second, one legislative act by one legislature before submission, and another by a second legislature after submission; while in the third there is only one legislative act required, and that before submission.

Taking them up in the order above set forth we can observe the evolution of the rule of law in making provision for the rule of progress.

In the first class there are thirty-one constitutions.<sup>17</sup> In these the initiative in twenty-two is by majority of each house.<sup>18</sup> While in five it is by a two-thirds vote of

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<sup>17</sup> Arkansas, 1868, XIII; California, 1849, X, 2; Connecticut, 1818; Florida, 1868, XVIII; Georgia, 1868, XII; Illinois, 1848; Indiana, 1851, XVI; Iowa, 1846, X, 1857, X; Kansas, 1855, XVI; Louisiana, 1845, VIII; Massachusetts, Am. 1821, IX; Michigan, 1835, XIII; Nebraska, 1864, XVI; New Jersey, 1844, IX; New York, 1821, XIII, 1846, 1894; North Carolina, 1776, Am. 1830; North Dakota, 1895, XV; Oregon, 1857, XVII; Pennsylvania, 1838, X, 1873, XVIII; Rhode Island, 1842, VII; Tennessee, 1834, XI, 1870; Vermont, Am. 1870; Virginia, 1870, XII; West Virginia, 1861, XII; Wisconsin, 1848, XII.

<sup>18</sup> Arkansas, 1868; California, 1849; Indiana, 1851; Iowa, 1846, 1857; Louisiana, 1845; Michigan, 1835; Nevada, 1864; New Jer-

all the members,<sup>19</sup> in two by three-fifths vote of each house,<sup>20</sup> and in Massachusetts and Connecticut as above stated.

The most usual time prescribed for the first publication is three months,<sup>21</sup> although in two six months is prescribed,<sup>22</sup> and in one "four times."<sup>23</sup>

The second legislative action prescribed in twenty of these State constitutions is by a majority of each house;<sup>24</sup> in eleven, however, a two-thirds vote of each house was required.<sup>25</sup>

The second publication prior to submission of the amendment to popular vote is usually left to the prescription of the legislature,<sup>26</sup> although Kansas, constitution of 1855, required that publication should be made "for at least six months prior to the next general election, at which election such proposed amendment shall be submitted." And in Louisiana, constitution of 1845, three months' publication was prescribed.

As to the provisions for the submission of the proposed

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sey, 1844; New York, 1821, 1846, 1894; North Dakota, 1895; Oregon, 1857; Pennsylvania, 1838, 1873; Rhode Island, 1842; Tennessee, 1824, 1870; Virginia, 1870; West Virginia, 1861; Wisconsin, 1848.

<sup>19</sup> Fla., 1868; Ga., 1868; Ill., 1848; Kans., 1855; Vermont, 1890.

<sup>20</sup> North Carolina, 1830, 1868.

<sup>21</sup> Ark., 1868; Cal., 1849; Fla., 1868; Ia., 1846, 1857; La., 1845; Mich., 1835; Nev., 1864; N. J., 1844; N. Y., 1821, 1846, 1894; N. D., 1895; Penn., 1838, 1873; Va., 1870; W. Va., 1861; Wis., 1848.

<sup>22</sup> N. C., 1776, 1868.

<sup>23</sup> Ore., 1857.

<sup>24</sup> Ark., 1868; Cal., 1849; Ill., 1848; Ind., 1851; Ia., 1846, 1857; La., 1845; Nev., 1864; N. J., 1844; N. Y., 1846, 1894; N. D., 1895; Ore., 1857; Penn., 1838, 1873; R. I., 1842; Vt., 1870; W. Va., 1861; Wis., 1848.

<sup>25</sup> Fla., 1868; Ga., 1868; Kan., 1855; Mass., Am., 1821 (majority of senate and two-thirds of house); Mich., 1835; N. Y., 1821; N. C., 1836, 1868; Tenn., 1834, 1870; Conn., 1818.

<sup>26</sup> Ark., 1868; Cal., 1849; Fla., 1868; Ill., 1848; Ind., 1851; Ia., 1857; Mich., 1835; Nev., 1864; N. J., 1844; N. C., 1830, 1868; N. Dak., 1895; Penn., 1838, 1873; R. I., 1842; Va., 1870; Tenn., 1834, 1870; Vt., 1870; W. Va., 1861; Wis., 1848.

amendments to popular vote, in nineteen of the constitutions a majority of all voting thereon was required;<sup>27</sup> in four, a majority of all voting at that election;<sup>28</sup> in three, a majority voting for representatives;<sup>29</sup> in one, a majority voting at town meetings;<sup>30</sup> in two an absolute majority of all electors,<sup>31</sup> and in one three-fifths of all voting at town meeting was made requisite.<sup>32</sup>

The constitutions of only three States are found in the second class,<sup>33</sup> viz.: Texas, Alabama and Delaware. This may be considered a little more simple method of making amendments. Instead of requiring the amendment, first, to be passed by the legislature; second, to be published and made an issue in the next legislative election; third, to be passed a second time by the legislature elected on the issue; fourth, to be republished as passed a second time, and, fifth, to be balloted on by the people, it shortens the process both in time and detail and makes the popular election following the first legislative action serve a double purpose, i. e., that of passing on the amendment and of electing a second house on this special issue. But this device was contrary to the theory of constitutional law. The people having expressed their will on the amendment as formulated by the first legislature, it was an unnecessary and unsafe provision to arm the legislature, an organ of government which might be affected by such amendment, with power to defeat the sovereign will. Again, this method does violence to the theory of our institutions by reason of the fact that it

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<sup>27</sup> Ark., 1868; Cal., 1849; Fla., 1868; Ia., 1846, 1857; Mich., 1835; Nev., 1864; N. J., 1844 (at a special election); N. Y., 1821, 1846, 1894; N. C., 1868; N. Dak., 1895; Penn., 1838, 1873; Vt., 1870; Va., 1870; W. Va., 1861; Wis., 1848.

<sup>28</sup> Ga., 1868; Ill., 1848; Kan., 1855; Ore., 1857.

<sup>29</sup> La., 1845; Tenn., 1834, 1870.

<sup>30</sup> Conn., 1818.

<sup>31</sup> Indiana, 1851; N. C., 1830.

<sup>32</sup> R. I., 1842.

<sup>33</sup> Ala., 1819, 1865, IX, 1867; Texas, 1845, 1865, 1868; Del., 1897.

assumes that the legislature is the proper ratifying agent in making constitutional changes, and that the submission to popular vote is merely a formal or convenient way of ascertaining the popular will. This assumption clearly appears in the constitutional provisions. The first constitution of the kind<sup>34</sup> reads as follows:

The general assembly, whenever two-thirds of each house shall deem it necessary, may propose amendments to this constitution, which proposed amendments shall be duly published in print at least three months before the next general election of representatives, for the consideration of the people, and it shall be the duty of the several returning officers, at the next general election which shall be held for representatives, to open a poll for and make a return to the Secretary of State for the time being of the names of all those voting for representatives who have voted on such proposed amendments, and if thereupon it shall appear that a majority of all the citizens of this State voting for representatives have voted in favor of such proposed amendments and two-thirds of each house of the next general assembly shall, after such election, and before another, ratify the same amendments by yeas and nays, they shall be valid, to all intents and purposes, as a part of this constitution.

The popular will having expressed itself, it was simply a question of time when these useless and contradictory after acts would be dropped and the method of amendment made to involve simply a legislative initiative, publication and submission to the people for ratification and adoption.

In the third class thirty-five constitutions are found.<sup>35</sup> It will be noticed that of these only seven allow an

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<sup>34</sup> Ala., 1819, "mode of Amending and Revising Constitution."

<sup>35</sup> Ala., 1875, XVII; Ark., 1874, XIX, 22; Cal., 1880, XVIII; Colo., 1876, XIX; Fla., 1885, XVII; Ga., 1877, XIII; Idaho, 1889, XX; Ill., 1870, XIV; Kans., 1858, 1859; Kentucky, 1891; La., 1852, IX, 1864, XII, 1868, IX, 1879, Sec. 256; Maine, 1819, X, 2; Md., 1864, 1867, XIV; Mich., 1856, XX; Minn., 1857, XIV, 2, 1874, XIV; Miss., 1832, 1868, 1870; Mo., 1865, XII, 1875, XV; Mont., 1889, XIX; Neb., 1875, XV; N. C.,

amendment to be initiated by a majority vote of each house,<sup>36</sup> while in twenty-eight a vote greater than a majority is required; twenty providing for a two-thirds vote<sup>37</sup> and eight for a three-fifths vote of each house.<sup>38</sup>

The prevailing length of publication is three months,<sup>39</sup> only six providing for a different time.<sup>40</sup>

As to the provisions for a popular vote on these amendments, all prescribe a majority vote; but twenty prescribe that this shall be a majority of electors "voting thereon,"<sup>41</sup> six a majority voting "for representatives,"<sup>42</sup> four a majority voting "at said election,"<sup>43</sup> three an absolute majority of electors,<sup>44</sup> and two simply provide for submission, without specifying; therefore in these last the majority required would depend on judicial interpretation.<sup>45</sup>

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1876; Ohio, 1851, XVI; S. Dak., 1889; Tex., 1876, XVII; Wash., 1889, XXIII; W. Va., 1872, XIV; Wy., 1889, XX.

<sup>36</sup> Mo., 1865, 1875; Ark., 1874; La., 1864; Minn., 1857, 1874; S. Dak., 1889.

<sup>37</sup> Miss., 1832, 1868, 1890; Mont., 1889; Tex., 1876; Wash., 1889; W. Va., 1872; Wy., 1889; Ala., 1875; Cal., 1880; Colo., 1876; Ga., 1877; Idaho, 1889; Ill., 1870; Kans., 1859; La., 1852, 1868, 1879; Me., 1819; Mich., 1856.

<sup>38</sup> Neb., 1875; Ohio, 1851; N. C., 1876; Ga., 1885; Ky., 1891; Kans., 1858; Md., 1864; Md., 1867.

<sup>39</sup> Miss., 1890; Mont., 1889; Neb., 1870; Tex., 1876; Wash., 1889; W. Va., 1872; Wy., 1889; Colo., 1876; Fla., 1885; Ill., 1870; Kans., 1858, 1859; La., 1852, 1868, 1879; Md., 1864, 1867; S. Dak., 1889.

<sup>40</sup> Ohio, 1851; Ark., 1874, provide that publication shall be made at least six months. Mo., 1865, provides at least four months. Ga., 1877, provides at least two months. Idaho, 1889, provides at least six times. Mo., 1875, provides for publication in each county four weeks prior to election. La., 1864, requires at least thirty days.

<sup>41</sup> Miss., 1832, 1890; Mo., 1865; Wash., 1889; W. Va., 1872; Ark., 1874; Cal., 1880; Colo., 1876; Fla., 1885; Ga., 1877; Kans., 1858, 1859; Ky., 1891; La., 1879; Me., 1819; Md., 1864; Mich., 1856; Minn., 1857, 1874; S. Dak., 1889.

<sup>42</sup> Miss., 1868; Ala., 1875; Ill., 1870; La., 1852, 1864, 1868.

<sup>43</sup> Neb., 1875; Ohio, 1851; Tex., 1876; Md., 1867.

<sup>44</sup> Idaho, 1889; N. C., 1876; Wy., 1889.

<sup>45</sup> *Mont.*, 1889; Mo., 1875.

In this class of amendatory devices it would appear that the details are very much reduced and the time shortened at least one legislative period. While the rule of progress is subserved by making amendatory provisions that will allow the governmental structure to be modified to suit the progress of the age, the rule of law and order is also preserved by placing such changes beyond the action both of political parties and governmental agents.

As shown before, the initiative in nearly all of these constitutions can be taken only by a two-thirds or a three-fifths vote of each branch of the legislature; after this from one to two years must elapse before it can be submitted to the people, thus giving time for mature deliberation and the subsidence of any popular fervor that might have given rise to the proposed amendment. Change by act of the established government is prevented by requiring a vote of the people, but in most of those constitutions a majority of those voting is sufficient to ratify and adopt. It has been found by experience that it is much more safe to presume that those not voting do not oppose an amendment than to require the actual assent of an absolute majority of all voters, for the reason that the electors are not apt to give attention to balloting on amendments during the excitement of an election unless they deem them opposed to their welfare.

Comparing these three classes chronologically, we find that the amendatory devices of the first class prevailed in the second quarter of the century; that the second class was chiefly employed in the '60s, and that the third class prevailed in the third and fourth quarters of the century.

Arranging these provisions for constitutional amendment in their respective classes by decades, the comparison is as follows:

Year	1800 -09	1810 -19	1820 -29	1830 -39	1840 -49
Class I	—	—	2	4	7
Class II	—	—	1	—	1
Class III	—	1	—	1	—

Year	1850 -59	1860 -69	1870 -79	1880 -89	1890 -97
Class I	4	5	3	—	1
Class II	—	4	—	—	1
Class III	6	7	11	6	3

Taking the prominent periods of their use, we find that all but four of the first class were adopted in the fifty years between 1820-69, inclusive, while all but two of the third class were adopted within the period from 1850-95, inclusive.

Comparing them from the standpoint of complexity, it appears that the first class—that is, the first from an evolutionary standpoint—is much more involved than the second, and that the second is more involved than the third; that there has been a progression in the direction of greater simplicity.

The last has been found also to be the most expeditious; it is operated with greater economy both of time and effort. At the same time the experience of the past has proven that this more simple and more direct method is a safe device for constitutional amendment; that it provides a means of adapting our institutions to the progress of the age with greater advantage to society than any of the preceding devices.

Summarizing the evolution of our institutions relative to the co-operation of the people in establishing their frame of government and in modifying its structure so as to adapt it to the growing needs of society, we find that some of our first constitutions were framed and adopted by popular assemblies, but that this method could not possibly be employed in large and widely scattered communities. That for the larger and more widely

distributed political bodies the representative principle was made use of. That in the first part of our constitutional period the representative, or delegate, was entrusted with this work. Gradually, however, as the representative and the delegate became further removed in their interests from the people, and as the interests of society grew more complex, as it became advantageous for the people to participate directly in the adoption of their fundamental law, they utilized their representatives as agents to formulate and report to them for adoption. Furthermore, it being desirable to have a rule of law to govern the formation of constitutions, this was established by them as the settled, legitimate rule to govern them in establishing new constitutional structures.

As to the minor changes, those which could be made by altering a small part of the general structure, there grew up a separate amendatory device whereby these lesser changes could be safely and economically effected, and the progress of constitutional development in this regard was along the line of increasing the power of the people and of giving to co-operation greater facility and expedition.

A rule of law, both safe and elastic, has thus been evolved from and brought into harmony with the rule of progress.



## CHAPTER VI.

## POPULAR CO-OPERATION IN THE ELECTION OF OFFICERS.

A frame of government must of necessity contain two kinds of provisions. It must provide corporate organs for the exercise of sovereign functions; it must also provide a means whereby these corporate organs may be manned. A governmental structure without living agents having power to operate its machinery would be but an inane, impotent figment of the mind.

The principle of sovereignty, in the evolution of political institutions, has been found to inhere in those organisms which have been able to manifest the greatest material force. At the time when the productive forces of society were disorganized, or organized in small, isolated communities, and self-government confined to local groups, the independent military organization that derived its resources from predation, by virtue of its being able to amass the greater strength, was supreme. Having established its supremacy, it then became competent to frame a government for the exercise of these sovereign powers, and by this means to retain a monopoly of government over the society which it ruled. History for many centuries was largely a record of conflicts between governments organized on this basis, and in the struggle for supremacy the necessity for resources of war and competence developed a wider and still wider organization of the industrial forces, till at last these forces obtained the mastery. Having obtained a mastery, the principle of self-interest, as manifested in expressions of the will of the majority, still compelled society along the *course of established institutions.*

The rights, the properties, the economic interests, the habits of the people are involved in their political organization. For this reason change can take place only as the interests and habits of the people are modified. Political society being dependent on the ideals of the political people, it must be a slow process of growth. The mental inertia of a nation, together with the necessity of orderly conduct on the part of its members in their social and industrial relations, require that institutional progress be a growth rather than a creation. Popular ideals flow largely from experience; the organs of government in a free political society are modified only as by experience they are found to conflict with the welfare of the ruling majority. This was the case in the evolution of the provisions in our government for the appointment and election of governmental agents.

In our early colonial\* establishments the institutions of the old world, especially of England, were directly impressed upon those governments which derived their structure and powers from charter grants. The voluntary association alone may be considered the product of a new environment operating on experience. Those colonies which derived their origin from charter grants were largely monarchical in their methods. Executive, administrative, judicial and legislative departments<sup>1</sup> were officered by men appointed by the Crown or its representatives. The voluntary associations were democratic. In these there were no institutional forces to compel, no interest to enforce the monarchical ideals of the past other than custom. In fact, the social and economic conditions were such as to make the democratic form the only one that could be adopted with advantage. Where the voluntary association obtained, there had been no

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<sup>1</sup> The legislative functions of government were exercised in some of these colonies by an appointed council, and in others by such a council sitting with popular representatives.

vested rights acquired under the fictions of absolutism; there was nothing to be gained by monarchical assumptions; there were few class distinctions to divide the people. On the other hand, such assumptions at that time would have been suicidal, for the interests of the people were of necessity communal. In these colonies all of the principal offices were at first elective.

But the influence of the prevailing institutions of the old world was forcibly felt in the new. Not only the superior authority of the Crown, but also the whole weight of institutional contact and social intercourse, tended to implant the political ideals of the past. While the influence of the environment of the new world tended to make the charter governments more popular, that of the old world tended to make the colonies that had been established by voluntary associations less popular, and the two forms found a common level in an establishment wherein the general executive, the general judicial, and a part of the legislative officers were appointive, and a part of the legislative and local officers were elective.<sup>2</sup> This, in general, was the status of colonial government till the time of the Revolutionary war.

After the colonies had asserted their independence of Britain, a movement set in in the direction of making elective all of the more general executive, judicial and legislative officers. To-day, except in the Federal judiciary, this is the rule.

In the first part of our colonial history the qualifications prescribed for electors were, generally speaking,

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<sup>2</sup> The plan of government settled upon in the colonies after the revolution of 1688, generally speaking, was that of a governor and council, having executive and legislative power, usually forming a part of the legislative, and a superior judiciary, appointed by the crown; while the remaining portion of the legislative body, and the local officers, were elected by the people.

those of residence,<sup>3</sup> age<sup>4</sup> and that of "freemen."<sup>5</sup> Sex was also understood as a qualification in common law. In fact, the idea that any other than males could vote seems scarcely to have been suggested, although in Virginia we find an act providing that "no woman, sole or covert," shall have a voice in the choice of burgesses,<sup>6</sup>

<sup>3</sup> No definite period of residence was at first required, but the warrants calling the election usually implied or specified residence as a condition precedent to the right of participation. Later a definite period was prescribed. In Pennsylvania, 2 years—charter 1696; Del., 2 years—7 Geo., II, 61a, Franklin & Hall, *Ld.* 1752, p. 118; Georgia, 6 months—act of June 9, 1761; N. C., 1 year—laws 1715, Ch. 10; R. I., town residence—Hall Code, 1767, 78; N. J., 1 year—12 Geo. I, Ch. 40, Neville's Laws, p. 142; S. C., 3 mcs.—act 1704, No. 227, 6 mos., act 1716, No. 365, 1 yr., act 1721, 3 Cooper, 2; N. Y. (in New York city and Albany), 3 mos.—11 Will., Ch. 74, Sec. 10; Virginia (for Williamsburg), 12 mcs. In N. H. (1 Geo. II, Ch. 107, Sec. 2) and in New York, outside of New York City and Albany (4 N. Y. Col. Doc. 127, and 6 N. Y. Col. Doc., 56) residence was not required if a freeholder. Prior to the enactment of 1704 in South Carolina, residence was not a prerequisite for those holding sufficient property.

<sup>4</sup> Twenty-one years was the general rule. In Mass.—4 Mass. Col. Ric. II, 117, 166—and in New Hampshire—1 N. H. Prov. Pap., 396—24 years was prescribed. In Rhode Island (1665) housekeepers eighteen years of age were allowed to take the oath of freemen—2 R. I. Col. Rec. 112—and Delaware retained the age qualification of 22 after the colonial period—Cons. 1797, IV, 1; Cons. 1831, I, 1.

<sup>5</sup> The qualification of "freemen" in New England colonies was very similar to that of citizen—Bishop, *Hist. of Elec.*, p. 47, 49, 97. There the term signified those who had been accorded the freedom of the colony. "To obtain this freedom, and thus become a freeman, and incidentally an elector, certain prescribed steps had to be taken. \* \* \* Freemen could originally be admitted at one of the general courts. \* \* \* Freemen became such upon taking the oath and having their names enrolled. Ultimately freemen were allowed to be admitted in their own towns." In some of the cities like New York and Albany the term signified those who had the freedom of the corporation—Bishop, pp. 47, 49. Virginia allowed the "inhabitants" to vote for burgesses, (1619)—1 Hening, 110, 113. Later it was provided that burgesses should be elected "by the votes of all persons who, having served their tyme as freemen of this country."—Bishop, p. 49. In the southern states this was quite usually the meaning of the word "freeman." As to Carolina, Pennsylvania, Delaware and Maryland, see Bishop, 49 and 50.

<sup>6</sup> 11 Will., III, Ch. 2; 3 Hening, 172.

amendments to popular vote, in nineteen of the constitutions a majority of all voting thereon was required;<sup>27</sup> in four, a majority of all voting at that election;<sup>28</sup> in three, a majority voting for representatives;<sup>29</sup> in one, a majority voting at town meetings;<sup>30</sup> in two an absolute majority of all electors,<sup>31</sup> and in one three-fifths of all voting at town meeting was made requisite.<sup>32</sup>

The constitutions of only three States are found in the second class,<sup>33</sup> viz.: Texas, Alabama and Delaware. This may be considered a little more simple method of making amendments. Instead of requiring the amendment, first, to be passed by the legislature; second, to be published and made an issue in the next legislative election; third, to be passed a second time by the legislature elected on the issue; fourth, to be republished as passed a second time, and, fifth, to be balloted on by the people, it shortens the process both in time and detail and makes the popular election following the first legislative action serve a double purpose, i. e., that of passing on the amendment and of electing a second house on this special issue. But this device was contrary to the theory of constitutional law. The people having expressed their will on the amendment as formulated by the first legislature, it was an unnecessary and unsafe provision to arm the legislature, an organ of government which might be affected by such amendment, with power to defeat the sovereign will. Again, this method does violence to the theory of our institutions by reason of the fact that it

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<sup>28</sup> Ga., 1868; Ill., 1848; Kan., 1855; Ore., 1857.

<sup>29</sup> La., 1845; Tenn., 1834, 1870.

<sup>30</sup> Conn., 1818.

<sup>31</sup> Indiana, 1851; N. C., 1830.

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assumes that the legislature is the proper ratifying agent in making constitutional changes, and that the submission to popular vote is merely a formal or convenient way of ascertaining the popular will. This assumption clearly appears in the constitutional provisions. The first constitution of the kind<sup>34</sup> reads as follows:

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<sup>35</sup> Ala., 1875, XVII; Ark., 1874, XIX, 22; Cal., 1880, XVIII; Colo., 1876, XIX; Fla., 1885, XVII; Ga., 1877, XIII; Idaho, 1889, XX; Ill., 1870, XIV; Kans., 1858, 1859; Kentucky, 1891; La., 1852, IX, 1864, XII, 1868, IX, 1879, Sec. 256; Maine, 1819, X, 2; Md., 1864, 1867, XIV; Mich., 1856, XX; Minn., 1857, XIV, 2, 1874, XIV; Miss., 1832, 1868, 1870; Mo., 1865, XII, 1875, XV; Mont., 1889, XIX; Neb., 1875, XV; N. C.,

Locke's constitution of South Carolina prescribed the acknowledgment and public worship of God.<sup>22</sup> This frame of government, however, was almost wholly inoperative, on account of its being so ill suited to the conditions of the new world. But owing to the political relations in Europe and to the religious prejudices against the Catholics growing out of these relations, the Catholics were quite generally barred from the right of suffrage among the colonies.<sup>23</sup>

Quakers having scruples against taking an oath in the name of God,<sup>24</sup> by reason of the oaths required as con-

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<sup>22</sup> Poore's Charters, 1407.

<sup>23</sup> "It seems to have been the rule in most of the American colonies that Roman Catholics could not vote. They were especially disfranchised by the statutes of New York (13 Will. III, Ch. 94; Van Schaak's Laws, 40; 3 N. Y. Col. Doc., 675), and Maryland (3 Charles, Lord Baltimore, Ch. 1, Sec. 3, 1718; Bacon's Laws, 'Profest Papists'). In these two governments persons suspected of papist beliefs were required before being permitted to vote, to take the oaths of supremacy and allegiance, and to sign the test and association. Papist recusants were disfranchised in New York (13 Will. III, Ch. 94), and Virginia ('Recusant Convicts,' 11 Wm. III, Ch. 2, 3 Henning, 172, 'Recusant' 3 Geo. III, Ch. I, Sec. 7, 7 Henning, 519).

"An early law of New Hampshire which was repealed immediately after it was enacted, required freemen to be protestants. (1 N. H. Prov. Papers, 396). \* \* \* The provisions in regard to church membership in Massachusetts during the government under the charter of 1628 would doubtless have excluded Roman Catholics. On the other hand the religion of the Baltimores and the general charter of the government would seem to justify the belief that before the royal regime commenced, in 1689, papists could vote in Maryland."—Bishop, 61 and 62.

<sup>24</sup> "Just before yielding to the royal commands, under pretense of permitting non-church members to become freemen, Massachusetts, in furtherance of her laudable desire to preserve the 'good and honest character' of her freemen, had passed a law which recounted the dangers she had found by experience to exist within her boundaries from those of her inhabitants who were 'enemies to all government, civil and ecclesiastical, who will not yield obedience to authority, but make it much of their religion to be in opposition thereto,' and who carried out their designs by electing wicked persons, etc. In consequence of all these evils it was enacted that 'all persons, Quakers or others, acting aforesaid,' shall be incapa-

ditions precedent, were put without the pale of the political state and the privileges of participation in the government.

In some of the colonies Jews were also deprived of the ballot.<sup>25</sup>

All of these religious qualifications were so foreign to the conditions of the new world and so adverse to all principles of justice that they generally disappeared, and the new regime established during and subsequent to the Revolutionary war in this regard found little to modify.<sup>26</sup>

The moral qualifications of New England, such as "persons of civil conversation who acknowledge and are obedient to the civil magistrates,"<sup>27</sup> "quiet and peaceable behavior and civil conversation,"<sup>28</sup> "sober and peaceful conversation,"<sup>29</sup> one who is not an "opposer of the good and wholesome laws of the colony,"<sup>30</sup> came largely from the prevailing ideas as to the attitude which the subject under monarchical rule had been taught to assume toward his sovereign. Those of the South, where the township did not prevail, came largely from the social and legal status imposed by the mother country. For

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ble of voting 'during their obstinate persistency in such wicked ways and courses, and until certificate be given of their reformation.' This law, it may be remarked, was not repealed while the colonial charter remained in force."—Bishop, 61.

<sup>25</sup> Bishop, p. 64.

<sup>26</sup> In the constitution of South Carolina, 1778, XIII, we find, "The qualifications for electors shall be that every free white man and no other persons, who acknowledges the being of a God, and believes in a future state of rewards and punishments \* \* \* shall be capable of electing a representative or representatives, for the parish or district where he actually is resident, or in any other parish or district in the state where he hath a like free-hold."—Poore's Charters, etc., II, p. 1623.

<sup>27</sup> 2 Rhode Island Col. Rec., 112. Also New Hampshire Laws, 1680.

<sup>28</sup> 1 Connecticut Col. Rec., 389. Session Laws, 40, Cambridge Ed., 1673, 26.

<sup>29</sup> Plymouth, Gen. Laws, 1671, Ch. 5, Sec. 5.

<sup>30</sup> Plymouth, (1658) Brigham, 113.



example, in Virginia convicts or persons convicted in Great Britain or Ireland and transported could not be enfranchised during their term of transportation.<sup>31</sup>

The notion that these harsh and exclusive qualifications for suffrage came largely from foreign influence is not a vague theory, but has much historic data to support it. The qualifications in the Crown colonies were frequently fixed by the commissions to the governors;<sup>32</sup> in some cases they were prescribed in the charter;<sup>33</sup> the proprietary governments were direct attempts to reproduce the feudal system and to limit popular participation in government. About 1660, also, a royal commission was appointed to investigate the governments of New England and to endeavor to secure uniform qualifications for electors in this relation. This commission exercised a direct influence and authority over the laws of the colonies.<sup>34</sup> In no particular do we find the institu-

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<sup>31</sup> So many were the convicts sent over to these shores by England that in 1769 Dr. Johnson, commenting on the Americans and their demands, refers to them as "a race of convicts" that "ought to be content with anything short of hanging." (James D. Butler, *British Convicts Shipped to the American Colonies*. *Am. Hist. Rev.*, Vol. II, p. 12). A very large number of persons taken prisoner in battle or convicted of political offenses were transported. In the year 1651 there were sixteen hundred ten prisoners taken in the battle of Worcester sent to Virginia. Many of the Dutch colonists taken prisoners in New York and Long Island by the English were sold in the south as slaves. Some of this "inferior class" were moral or religious outcasts, and many were criminals. It has been estimated that no less than 50,000 people under ban of law were transplanted prior to the revolutionary war, most of whom were sent in the seventeenth century.—See *Am. Hist. Rev.*, Vol. II, p. 12, et seq., also Ballah's *White Servitude in the Colony of Virginia*. The wholesale practice on the part of England must of necessity have affected the laws in the colonies, although those enactments which were the direct product of this practice, and which were not subsequently supplanted or made necessary by present conditions, were repealed when the practice ceased.

<sup>32</sup> Bishop, 46.

<sup>33</sup> Charter 1691. Massachusetts, *Poore's Charters*, p. 949.

<sup>34</sup> Bishop, p. 59.

tional influences from abroad more potent than in the property qualifications for suffrage. Some of the colonies imposed property qualifications under the direct guidance and recommendations of the commission above referred to.<sup>35</sup> Others had them fixed by charter.<sup>36</sup> In all, the whole influence, social and political, coming from the other side, was toward property qualifications, while the special grants of territory and authority and the feudal institutions implanted here tended, during the colonial period, to build up at home an environment that would demand and sustain such a rule of law.<sup>37</sup>

Property qualifications were more exclusive in their operation than any of the others imposed. The evolution in Virginia was as follows: From 1619, the date of the first election for burgesses, to 1655 there were no property qualifications imposed; all of the "inhabitants" could vote.<sup>38</sup> In 1655 a law was passed restricting suffrage to "housekeepers;"<sup>39</sup> but in 1656 this law was repealed because it was so great a hardship on taxpayers that were not housekeepers.<sup>40</sup> In 1670 the general voting was restricted to "freeholders and housekeepers who were answerable to the publique for levies."<sup>41</sup> The tem-

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<sup>35</sup> Rhode Island and Connecticut for example.

<sup>36</sup> See Constitutions of Carolina, 1669; Mass., 1691; etc. In the latter we find the following provision: "Noe Freeholder or other person shall have a vote in the elecon of members to serve in any Greate or general court or Assembly to be held as aforesaid, who, at the time of Such elecon shall not have an estate of freehold in Land within Our said Province or Territory, to the value of Forty shillings per annum at the least, or other estate to the value of Forty pounds sterling."

<sup>37</sup> "In New England, as in Virginia, there were no property qualifications required at first, and the author is of the opinion that with the possible exception of Connecticut its introduction was due solely to the interference of the crown."—Bishop, p. 72.

<sup>38</sup> 1 Hening, 112.

<sup>39</sup> 1 Hening, 403, 416.

<sup>40</sup> 1 Hening, 403.

<sup>41</sup> 2 Hening, 220.

porary government of the insurgents during Bacon's rebellion repealed this law and admitted all free men;<sup>42</sup> but the same year (1676), the rebellion having been put down, the freehold qualification became permanent.<sup>43</sup> In 1736 the real property requirement was increased to one hundred acres of uncultivated land, or twenty-five under cultivation.<sup>44</sup> Later this was reduced to fifty acres of uncultivated or twenty-five cultivated.<sup>45</sup> The property qualifications were not abolished till the middle of the nineteenth century.

Connecticut, 1658, imposed a qualification of "thirty pounds proper personal estate."<sup>46</sup> In 1662 it was reduced to twenty pounds, "besides the person in the list of estate,"<sup>47</sup> and, in 1675, to ten pounds freehold "estate in land besides their personal estate."<sup>48</sup> In 1689 the requirement was a freehold estate of forty shillings in county taxes,<sup>49</sup> and the laws finally required a "freehold estate to the value of forty shillings per an., or forty pounds personal estate."<sup>50</sup>

Massachusetts first had property qualifications introduced through the Plymouth colony, 1665, requiring "twenty pounds ratable estate, at the least, in the government" before the applicant was entitled to the rights of a freeman.<sup>51</sup> A provision alternative to the church membership qualification was made in the Massachusetts Bay colony which allowed those to vote who were "householders, and who had an estate, ratable to the county in

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<sup>42</sup> 2 Hening, 425.

<sup>43</sup> 22 Charles, II.

<sup>44</sup> 4 Hening, 475.

<sup>45</sup> 7 Hening, 519.

<sup>46</sup> 1 Conn. Col. Rec., 331, 389, 439.

<sup>47</sup> 2 Conn. Col. Rec., 253.

<sup>48</sup> 2 Conn. Col. Rec., 253.

<sup>49</sup> 4 Conn. Col. Rec., 11.

<sup>50</sup> Session Laws (Conn.), p. 40.

<sup>51</sup> Book of General Laws (1671), Ch. 5, Sec. 5.

a single country tax rate, after the usual manner of valuation in the place where they live, to the full value of ten shillings.”<sup>52</sup> In 1691, these two colonies having been united under one charter, “an estate of freehold in land within Our said Province or Territory to the value of Forty shillings per annum at the least, or other estate, to the value of Forty Pounds Sterl.”<sup>53</sup> became the property qualification for suffrage.

In Rhode Island, from 1665 to 1723, the property requirement was “a competent estate.”<sup>54</sup> The law of 1723 prescribed that a “freeman must be a freeholder of Lands, Tenements and Hereditaments, in such towns where he shall be admitted free, of the value of one hundred pounds, or to the value of 40 shillings per a.”<sup>55</sup> Seven years afterward (1730) the requirement was increased to two hundred pounds, or of the value of ten pounds per year.<sup>56</sup> In 1747 it was again doubled, making it four hundred pounds, or twenty pounds per year.<sup>57</sup> This was the climax of exclusion from suffrage by imposition of property qualifications. Twenty years later, 1767, the prescription became fifty pounds, or an annual rental of forty shillings, and subsequently, 1842, the property qualifications were made “real estate of the value of one hundred and thirty-four dollars, over and above any rent reserved, or the interest of any encumbrance thereon.”<sup>58</sup> This requirement, however, was alternative to a tax of not less than one dollar.<sup>59</sup>

The property qualification imposed in New Hampshire

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<sup>52</sup> 4 Mass. Col. Rec., II, 117, 167.

<sup>53</sup> Poore's Charters, etc., I, p. 935.

<sup>54</sup> 2 Rhode Island, Col. Reg., 112.

<sup>55</sup> 9 Geo. I, Franklin Ed., 1830, 131.

<sup>56</sup> 3 Geo. II, Franklin Ed., 1830, 206.

<sup>57</sup> 20 Geo. II, Franklin Ed., 1752, 13.

<sup>58</sup> Const. 1842, Art. II, Sec. 1, Poore's Charters, p. 1605.

<sup>59</sup> Const. 1842, Art. II, Sec. 2-3.

by its first assembly was soon repealed.<sup>60</sup> In 1691, however, the right of suffrage was restricted to freeholders having forty pounds a year or personal property of fifty pounds.<sup>61</sup> Later, in 1729, the requirement was made a fifty pound freehold estate in the town, parish or precinct in which the voter was otherwise qualified to vote for representatives.<sup>62</sup>

In New York the qualifications for suffrage throughout all the colony under the first charter of liberties prescribed a freehold;<sup>63</sup> under the second charter a freehold with forty shillings per annum;<sup>64</sup> and, later, the holding of "Lands and Tenements, improved to the value of Forty pounds in Freehold, free from all incumbrances," was required.<sup>65</sup>

Locke's constitution of Carolina, 1669, prescribes a freehold qualification for electors, that none shall have a vote for members of Parliament "that hath less than fifty acres of freehold within the said precinct."<sup>66</sup>

The fifty-acre freehold qualification was followed in Maryland, 1678;<sup>67</sup> East Jersey, 1683;<sup>68</sup> Pennsylvania, 1696;<sup>69</sup> New Jersey, 1702;<sup>70</sup> Delaware, 1734;<sup>71</sup> North Carolina, 1735,<sup>72</sup> and Georgia, 1761.<sup>73</sup> This qualification

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<sup>60</sup> Bishop, p. 75.

<sup>61</sup> II William III, 3 Prov. Papers, 216.

<sup>62</sup> I Geo. III, Ch. 107, Fowle Ed., 1771, 166.

<sup>63</sup> Bishop, 75.

<sup>64</sup> Bishop, 75.

<sup>65</sup> II William III, Ch. 74, Van Schaack's Laws, 28.

<sup>66</sup> Poore's Charters, etc., II, p. 1397.

<sup>67</sup> Act of 1678, 4 Anne, Ch. 35; 1715, Ch. 42, Baskett, Ed. 1723, 131.

<sup>68</sup> Poore's Charters, etc., II, p. 1664.

<sup>69</sup> Poore's Charters, etc., II, p. 1531.

<sup>70</sup> 7 Anne, Ch. 4, Sec. 1, Neville's Laws, p. 7; 8 Geo. III, Allison's Laws, 306.

<sup>71</sup> 7 Geo. II, Ch. 61a, Franklin & Hall Ed., 1752, 118.

<sup>72</sup> 8 Geo. II, Ch. 2; 17 Geo. II, Ch. 1, Sec. 3; Davis & Swan Ed., 1752, 177.

<sup>73</sup> Law of 1761, June 9th.

was further extended—in Pennsylvania by the requirement that the fifty acres “be cleared and seated;”<sup>74</sup> in East Jersey that ten acres be in cultivation.<sup>75</sup> An alternative qualification<sup>76</sup> was provided, however, of forty pounds personal estate, in Maryland,<sup>77</sup> in New Jersey real and personal estate of fifty pounds value,<sup>78</sup> and in Delaware personal estate of fifty pounds.<sup>79</sup>

In South Carolina, 1692, an attempt was made in the legislature to reduce the property qualification to ten pounds, allowing the applicant to make oath that he was possessed of that amount, but the law was vetoed by the proprietors on account of there being no freehold qualification.<sup>80</sup> In 1704 an alternative personal property qualification of ten pounds was provided;<sup>81</sup> in 1716 the personal property qualification was raised to thirty pounds.<sup>82</sup> In 1717 the fifty-acre freehold qualification allowed an alternative of taxes on fifty pounds;<sup>83</sup> in 1721 the tax alternative was made twenty shillings;<sup>84</sup> in 1745 provision was made that the freehold must be cultivated, or, if not cultivated, then there must be three hundred acres on which taxes are paid,<sup>85</sup> and, in 1759, the free-

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<sup>74</sup> Law “made at Newcastle in the year One Thousand Seven Hundred, entitled, An Act to ascertain the number of Members of the Assembly, and to regulate Elections,” referred to in the Charter of 1701, Poore’s Charters, etc., p. 1538—4 Anne, Ch. 129, Franklin Ed., 1742, 67.

<sup>75</sup> Poore’s Charters, etc., II, p. 1397.

<sup>76</sup> Alternative qualifications were provided whereby those having personal property and no real-estate could vote.

<sup>77</sup> 2 Charles Lord Baltimore, Ch. 11, Sec. 3, Bacon’s Laws.

<sup>78</sup> 7 Anne, Ch. 4, Sec. 1, Neville’s Laws, p. 7, 8, Geo. III, Allison’s Laws, 306.

<sup>79</sup> 7 Geo. II, Ch. 61a, Sec. 2, Franklin & Hall Ed., 118.

<sup>80</sup> Bishop, p. 78, note 1.

<sup>81</sup> Act 1704, No. 227, 2 Cooper, 249.

<sup>82</sup> Act 1716, No. 365, 2 Cooper, 683.

<sup>83</sup> Act 1717, No. 373, 3 Cooper, 2.

<sup>84</sup> Act 1721, No. 446, 3 Cooper, 135.

<sup>85</sup> Act 1745, No. 730, 3 Cooper, 657.

hold qualification was made one hundred acres, or a tax of ten shillings.<sup>86</sup>

After the Declaration of Independence property qualifications appear in the following constitutions: In Connecticut, 1818,<sup>87</sup> freehold; in Louisiana, 1812,<sup>88</sup> land; Maryland, 1776,<sup>89</sup> fifty acres of land or other property, with thirty pounds; Massachusetts, 1780, a "freehold estate within the commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds" for senatorial elector,<sup>90</sup> and "a freehold of the value of one hundred pounds, within the town he shall represent, or any ratable estate of the value of two hundred pounds"<sup>91</sup> for electors of representatives; Mississippi, territorial government, 1808,<sup>92</sup> "fifty acres, or who may hold in his own right a town lot of the value of one hundred dollars within the said territory;" New Jersey, 1776, "fifty pounds proclamation money, clear estate in the same;"<sup>93</sup> New York, 1777, "a freehold of the value of twenty pounds" or a tenement "of the yearly value of fifty shillings."<sup>94</sup> The New York constitutions of 1821<sup>95</sup> and 1846<sup>96</sup> also required a two hundred and fifty dollar freehold estate of free colored persons; North Carolina, 1776, "a freehold estate within the said county of fifty acres of land," for senatorial electors, and an alternative tax or freehold qualification for representatives;<sup>97</sup> by

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<sup>86</sup> Act 1759, No. 885, 33 Geo. II, 4 Cooper, 98.

<sup>87</sup> Conn., 1818, IV, 2.

<sup>88</sup> La., 1812, II, 8.

<sup>89</sup> Md., 1776, II.

<sup>90</sup> Mass., Ch. I, Art. II, Sec. 2.

<sup>91</sup> Mass., Ch. I, Art. IV, Sec. 3.

<sup>92</sup> Mississippi Ter., Gov. 1808, Sec. I.

<sup>93</sup> N. J., 1776, IV.

<sup>94</sup> N. Y., 1777, VII.

<sup>95</sup> N. Y., 1721, II, I.

<sup>96</sup> N. Y., 1746, II, I.

<sup>97</sup> N. C., 1776, VII.

amendment, 1835,<sup>98</sup> the freehold qualification for senatorial electors was retained; Rhode Island, 1842,<sup>99</sup> "real estate \* \* \* of the value of one hundred thirty-four dollars, over and above all incumbrances, or which will rent for seven dollars per annum, over and above any rent reserved, or the interest of any incumbrance thereon;"<sup>1</sup> South Carolina, 1778,<sup>2</sup> "a freehold of at least fifty acres of land, or a town lot;"<sup>3</sup> 1790,<sup>4</sup> fifty acres, a town lot or a tax; Tennessee, 1796,<sup>5</sup> a freehold; Virginia, 1776,<sup>6</sup> "shall remain as exercised at present"—that is, the same as under the last colonial acts; 1830,<sup>7</sup> "qualified to exercise the right of suffrage according to the former constitution and laws;" \* \* \* or "an estate or freehold in land of the value of twenty-five dollars, and so assessed to be, if any assessment thereof be required by law; and every such citizen being possessed as tenant in common, joint tenant, or partner of an interest or share of land, and having an estate of freehold therein" of the value of twenty-five dollars; "and every citizen being entitled to a reversion or vested remainder in fee, expectant or an estate for life, or lives in land of the value of fifty dollars," a leasehold estate "of a term originally not less than five years, of an annual value or rent of twenty dollars," or a tax qualification; Georgia, 1777,<sup>8</sup> property of ten pounds value and liable to the payment

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<sup>98</sup> Am., 1834, II, 3.

<sup>99</sup> Rhode Island, 1842, II, 1.

<sup>1</sup> This provision in the constitution further sets forth the alternative of a tax.

<sup>2</sup> South Carolina, 1778, XIII.

<sup>3</sup> An alternative tax qualification is also provided.

<sup>4</sup> South Carolina, 1790, I, 4, see also amendment, 1810.

<sup>5</sup> Tennessee, 1796, III, 1.

<sup>6</sup> Va., 1776, Poore's Charters, II, 1910.

<sup>7</sup> Va., 1830, III, 14.

<sup>8</sup> Ga., 1777, IX.



of taxes;<sup>9</sup> Vermont, 1786,<sup>10</sup> "freemen, having a sufficient evident common interest with and attachment to the community;"<sup>11</sup> 1793,<sup>12</sup> this provision was re-enacted.

The property qualifications were abolished in the several States mentioned as follows: Connecticut, 1845; Maryland, 1810; Massachusetts, 1822; Mississippi, 1817; New Jersey, 1844; New York, 1821, except for persons of color; North Carolina, 1854; South Carolina, 1865; Tennessee, 1834; Virginia, 1850; Georgia, 1789; Louisiana, 1845.

✓✓ The inequity of the principle of a freehold or household qualification impressed itself upon the colonists at an early date. We have already noted that the Virginia burgesses repealed the law of 1665 limiting the franchise to "housekeepers, whether freeholders, leaseholders or other tenants," because they thought it "something hard and unagreeable to reason that any persons shall pay equall taxes, and yet have no votes in elections."<sup>13</sup> But the foreign influence was too strong to resist, and for something over a century property qualifications thrived. The increase of economic interests, other than agricultural, the growth of manufacture and commerce, finally demanded that the suffrage be so broadened as to include other forms of property. The personal property qualification took its place alongside of the real property requirement. Later this proved unsatisfactory, and another English device was made use of by the colonists, viz., tax qualification.<sup>14</sup> The idea that there should be

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<sup>9</sup> In this the tax qualification is in addition to the property qualification instead of being an alternative.

<sup>10</sup> Vt., 1786, I, 9.

<sup>11</sup> This might be construed into a property qualification, but the other clauses of the constitution seem to give it a different meaning. The writer has no knowledge as to the construction actually given.

<sup>12</sup> Vermont, 1793, I, 10.

<sup>13</sup> Hening, 403.

<sup>14</sup> Bishop, p. 78.

no taxation without representation had become axiomatic in English political life, and was appealed to most strongly by Americans immediately prior and subsequent to the Revolutionary war. The tax qualification had been little employed during the colonial period, but gradually the property qualifications were made alternative with that of taxation, or were entirely supplanted by it.

✓✓ In Pennsylvania by the "frame of government," made and granted by William Penn, 1683, and the "Laws agreed upon in England," "every inhabitant, artificer or other resident in the said province that pays scot and lot to the government"<sup>15</sup> was deemed and accounted a freeman, the same as one having the real property qualifications; in North Carolina, 1715,<sup>16</sup> suffrage was given to those who had paid taxes for the year preceding the election; in South Carolina, 1717,<sup>17</sup> persons liable to payment of taxes were accorded the privilege, and by the laws of 1721,<sup>18</sup> 1745,<sup>19</sup> 1759<sup>20</sup> the tax qualification was continued in different forms. These cases, however, at this early date, may be stated as the exception rather than the rule. Later the alternative qualifications became the rule, and in the early part of the national period the tax qualification began to supplant the property qualification. This is seen in the constitutions of Delaware,<sup>21</sup> Georgia,<sup>22</sup> Massachusetts,<sup>23</sup> Mississippi,<sup>24</sup>

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<sup>15</sup> Penn. 1683, II.

<sup>16</sup> Laws 1715, 2. North Colonial Rec., 213.

<sup>17</sup> Act 1717, No. 373, Sec. 9; Cooper, 2.

<sup>18</sup> Act 1721, No. 446, 3 Cooper, 135.

<sup>19</sup> Act 1745, No. 730, 3 Cooper, 657.

<sup>20</sup> Act 1759, No. 385, 4 Cooper, 98.

<sup>21</sup> Delaware, 1792, IV, 1, 1831, IV, 1.

<sup>22</sup> Georgia, 1777, IX, 1789, IV, 1, 1798, IV, 1, 1865, V, 1, 1868, II, 2.

<sup>23</sup> Mass., Am. 1822, amendment Art. III.

<sup>24</sup> Miss., 1817, III, 1.

Missouri,<sup>25</sup> New York,<sup>26</sup> North Carolina,<sup>27</sup> Ohio,<sup>28</sup> Pennsylvania,<sup>29</sup> Virginia<sup>30</sup> and Connecticut.<sup>31</sup>

✓✓ Gradually these tax qualifications are becoming eliminated.<sup>32</sup> In some of the States, however, a new use of property and tax qualifications is being made. Where matters of financial importance are submitted to a vote of the people, before they are made binding, as in Texas<sup>33</sup> and in Colorado,<sup>34</sup> it is required that those who vote thereon shall be taxpayers, or shall have paid a property tax during the year previous to the election. Such provisions seem most wholesome, as a bonded debt is in the nature of an incumbrance on property, and therefore those who do not own property, and will not be called upon to assist in the payment of the debt, should not be allowed to impose it. Their powers, it would seem, should be limited to current taxation.

With the breaking away from property qualifications and the adoption of those based on the payment of taxes, the theory of the right of suffrage was based on support

<sup>25</sup> Mo. Ter. Gov., 1812, Sec. 6.

<sup>26</sup> N. Y., 1777, VII; 1821, II, 1; 1846, II, 1.

<sup>27</sup> N. C., 1776, VII, and IX.

<sup>28</sup> Ohio, Enabling Act, 1802, IV, 1.

<sup>29</sup> Penn., 1776, Plan, Sec. 6, 1790, III, 1, 1838, III, 1, 1873, VIII, 1.

<sup>30</sup> Virginia, 1839, III, 14, 1864, III, 1, Am., 1876, III, 1.

<sup>31</sup> Conn., 1818, IV, 2.

<sup>32</sup> A few of them still remain in the older states.

<sup>33</sup> Texas, 1876, VI, 3, has the following provision:

"All qualified electors of the state, as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all elective officers, but in all elections to determine the expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city, or incorporated town: Provided, That no poll tax for the payment of debts thus incurred shall be levied upon the persons debarred from voting in relation thereto."

<sup>34</sup> Colo., 1876, XI, 8.

of government rather than the property interests to be protected thereby; and military service,<sup>35</sup> labor on roads,<sup>36</sup> etc., were in some States made equivalent to taxes. The tide of popular opinion, however, demanding manhood suffrage, rose to such heights that nearly all provisions short of this were finally swept away. The impetus given to democracy by the successful issue of the Revolutionary war was not such as to carry away the whole fabric of government, as in France, but during the period of the struggle for freedom the American people were being schooled in the development of institutions and the establishment and maintenance of order, in America, the general welfare being foremost in the minds of the people as the true end of political establishments and order necessary to this welfare, democracy assumed a conservatism unknown in other lands. Change came only as industrial interests demanded it. The justice of manhood suffrage had impressed itself on the popular mind many years before manhood suffrage was realized as a fact. A most interesting demonstration of this conservatism, and at the same time of the evolutionary trend of our institutions in this particular, appears in the constitutional convention of New York, 1821. The constitution of 1777 had prescribed a land qualification for voters in all parts of the State except New York city and Albany.<sup>37</sup> There was a strong party in the State to uphold this on conservative grounds. The contest in the convention of 1821 was a spirited one; but finally the land qualification was abolished as to all except free men of color, who were required to have a freehold of the value of two hundred and fifty dollars.<sup>38</sup> As

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<sup>35</sup> Conn., 1818, IV, 2; Fla., 1838, VI, 1; Miss., 1817, III, 1; N. Y., 1821, II, 1; Rhode Island, II, 2.

<sup>36</sup> New York, 1821, II, 1; Ohio, 1802, IV, 5.

<sup>37</sup> New York Const., 1777, VII.

<sup>38</sup> New York Const., 1821, II, 1.

- ✓ to all others it was decided that service to the State was the proper basis for participation in acts of government, and thereupon the following alternatives were given:

A male citizen of the age of twenty-one years who shall have been an inhabitant of the State \* \* \* and shall have, within the year next preceding the election, paid a tax to the State or county assessed upon real or personal property; or shall by law be exempt from taxation; or being armed and equipped according to law, shall have performed within that year military duty in the militia of the State; or shall be exempt from performing military duty in consequence of being a fireman in any city, town or village in the State, \* \* \* ; or assessed to labor upon the public highways and shall have performed the labor or paid an equivalent therefor according to law, shall be entitled to vote in the town or ward in which he actually resides.

- ✓ This was a compromise between the principle of manhood suffrage and property suffrage, involving the idea of representation on the basis of taxation, so modified as to include all manner of service to the State. It was but a step further to manhood suffrage, yet this was not taken in this State for about fifty years.

Along with property qualifications came those based on legal and social status. They both belonged to the same polity; were imported from the same source.<sup>39</sup> With the breaking down of our institutional dependence on England, there was nothing left to support property qualifications for suffrage. The whole tendency of American political thought was in the opposite direction, and it only remained for the interests and industrial activities of society to so adjust themselves as to require a change in the established rule of law. The qualifica-

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<sup>39</sup> The former came from the monarchical and feudal ideas of Europe. Slavery and bond service was of the same origin. In fact, we may say without danger of contradiction that slavery was foisted on America in the same spirit that the lands were apportioned and occupied by those receiving patents.

tions based on the legal status, however, having been once introduced, were on a different plane. They entered into the social fabric—became a part of our industrial system in those regions where slavery was economically advantageous. The whole web and woof of our social, industrial and legal system supported them, and instead of disappearing with the withdrawal of those forces which had been instrumental in implanting them, they grew and assumed a more permanent part. The conditions of the whole country were at first favorable to servitude and slavery. When the country was first opened it was highly advantageous to the master, the planter, the lord, to have a servile class which he could command. It was a profitable way of organizing the industrial forces for the establishment of a society in a wilderness, or upon raw agricultural lands. The necessary means for a livelihood, a competence for life, having been secured, however, the servile bonds became onerous to a large part of society. In those places where commerce and manufacture occupied the industrial energies slavery, even apprenticeship, was found to be unfavorable, and disappeared with the changed condition of society.

But in certain parts the economic development was such as to make slavery and social dependence advantageous to those in control of the industrial forces, and the legal and political systems, reflecting this, threw the institutions of the various members of the national federation out of harmony. This conflict of interests, asserting itself in armed violence, finally resulted in the uniform establishment of the stronger industrial polity, and the consequent remoulding of the suffrage qualifications.

Qualifications based on the legal status of servitude by indenture were imposed in all of the colonies; but this form of servitude passed away and with it the general

qualifications based thereon. Those based on the legal status of slavery, so far as contained in express provisions, had their beginning in the early part of the eighteenth century, and were confined to the South. There was no colonial law in the North to prevent any negro, if free, from voting.<sup>40</sup> In North Carolina, after 1715,<sup>41</sup> no negro or mulatto could vote; in South Carolina, 1716,<sup>42</sup> suffrage was restricted to white men.<sup>43</sup> Georgia also established the same restrictions in 1761,<sup>44</sup> and in 1763<sup>45</sup> Virginia excluded the blacks. Slavery at all times disqualified, and during the national period the fact found expression in the constitutions of many of the States<sup>46</sup> where slavery was allowed. Out of the institution of slavery came the qualifications as to color and race. The expression, "white male citizen," or words of such import, are found in the constitutions of twenty-three States.<sup>47</sup> In some, this color qualification was repealed before the civil war, but most of them awaited the action of the fourteenth amendment.

✓✓ The history of suffrage qualifications shows us that those of age, residence, citizenship, or some relationship akin thereto, have been considered conditions necessary to participation in acts of government at all of the times herein mentioned; in fact, are essential to the general welfare of a nation under free government, be it democratic or representative in its form; that qualifications

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<sup>40</sup> Bishop, 51

<sup>41</sup> Laws, 1715, 2 N. C. Col. Rec., 213.

<sup>42</sup> Act 1716, No. 365, Sec. XX. This act was followed by those of 1717, No. 373; 1719, No. 394; 1721, No. 446; 1745, No. 730, in which the same restriction was maintained.

<sup>43</sup> Negroes were sometimes allowed to vote in derogation of law.

<sup>44</sup> Law of 1761, June 9.

<sup>45</sup> 3 Geo. III, Ch. I, Sec. 7, 7 Hening, 517.

<sup>46</sup> See note 49, p. 152.

<sup>47</sup> See note 50.

based on religion, morals, property, taxation, military or other public service, legal status, race and color have grown out of special conditions foreign to our political, social and industrial habits; that with the removal of those extraneous influences which introduced them these qualifications, one after another, have disappeared, or are fast disappearing.

The qualification of sex is also one that came in with our political and legal system as an importation, and, though still prevailing in most of our States, it remains simply as a matter of expediency to determine whether it shall be retained or abolished. In determining the question of expediency the people have been most conservative. Agitation for woman's suffrage began early in the century. In the middle period it had assumed the proportions of an organized movement. The experiment was first tried in local matters—school elections. In this, as well as other political movements, the West has been the quickest to respond to forces directed toward institutional change; here popular thought is the least hampered by social prejudice; here the web of convention and custom is weakest. Western society has not become cast in a groove by decades, nay centuries, of settled social and industrial relations. Western society being new, being rather an aggregation of individuals facing a new environment, having a population which has been drawn from every part of the country, in fact from every part of the world, its institutions are more nearly the product of its own creative forethought and mental adjustments. Here we find the experiment of woman's suffrage made in response to the agitation of the middle of the century. In school elections it would appear that the question of expediency had been answered in the affirmative. At the present time most of the States of the West, the North and the East have made provision for the co-operation of women in school elec-



tions. Several of the State constitutions have also made provision for the extension of the franchise by act of the legislature, placing the power to make the change where it can be most easily exercised when popular sentiment shall demand it. Three of the States have made provision for woman's suffrage in all elections.<sup>48</sup> In municipal and general elections, however, we are now in the experimental stage. If, in the States where the change has been made, the experiment proves beneficial the question of expediency will be solved for those which are contemplating the movement.

That the qualifications are growing less restrictive and popular co-operation in government is becoming more widely extended will appear conclusively from the following classification of constitutional provisions:

1. Those allowing FREE WHITE MALE CITIZENS (or those declaring intentions) twenty-one years of age, plus residence.<sup>49</sup>

2. Those allowing WHITE MALE CITIZENS (or those declaring intentions) twenty-one years of age, plus residence.<sup>50</sup>

<sup>48</sup> Wy. Cons., 1889, VI, 1; Colo. Cons., 1876, VII, 2, L. 93, p. 206; Utah Cons., 1895, IV, 1.

The provisions of the Utah and Wyoming constitutions are in words following: "The rights of citizens of the State of \_\_\_\_\_ to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges."

<sup>49</sup> Ark.—Prov. Gov. 1819, Sec. 16; Const. 1836, IV, 2; 1864, IV, 2; Colo. Ter. Gov., 1861, Sec. 5; Del., 1892, IV, 1; Kans. Ter., Gov. 1854; Fla., 1838, VII; Iowa, Ter. Gov., 1838, Sec. 5; Ky., 1799, II, 8; 1850, II, 8; La., 1845, II, 10; 1852, II, 10; 1812, II, 8; Md., 1810, Am. XIV, 1851, I, 1; Minn., Ter. Gov., 1849, 5; Miss., Ter. Gov., 1801, Sec. 1; 1817, III, 1; 1817, Sched.; 1832, III, 1; Mo., Ter. Gov., 1812, Sec. 6; 1820, III, 10; Nev., Ter. Gov., 1861, Sec. 5; N. C., Am. 1854, I, 3; S. C., 1878, XIII; 1790, I, 4; Am., 1810; 1865, IV; Tenn., 1834, IV; Tex., 1845, III, 1; 1866, III, 1; Utah, Ter. Gov., 1830, V; Wis., Ter. Gov., 1846, 5.

<sup>50</sup> Ala., 1819, III, 5; 1865, VIII, 1; Cal., 1847, II, 1; Conn., 1818, VI, 2, Am., 1845, VIII, 2; Fla., 1865, VI, 1; Ga., 1777, IX;

3. Those allowing MALE CITIZENS (or those declaring intentions) twenty-one years of age, plus residence.<sup>51</sup>

4. Those allowing a CITIZEN (or one declaring intentions) twenty-one years of age, plus residence.<sup>52</sup>

There are certain qualifications, however, looking to intelligence, purity and efficiency, such as education, registration, freedom from attainder, etc., that are growing in favor, and seem most wholesome in conserving the highest welfare of the State. The educational foundation rests upon the same reasonable foundation as that of age. It is a vicious principle that would allow those to participate in government who either had insufficient knowledge of affairs to form mature judgments or were so illiterate as to be made the tools or dupes of those who would impose upon them. The necessity of an educational qualification has been realized, and has found expression in the constitutions of Massachusetts,<sup>53</sup> Connecticut<sup>54</sup> and Louisiana,<sup>55</sup> while the constitutions of

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1865, V, 1; Ill., 1818, Sched. 12, 1848, VI, 1; Ind., 1816, VI, 1; 1851, II, 2; Iowa, 1846, II, 1; 1857, II, 1; Kans., 1855, II, 2; La., 1864, III, 14; Md., 1864, I, 1; 1867, I, 1; Mich., 1835, II, 1; 1850; Minn., 1857, VII, 1; Mo., 1865, II, 18; Neb., 1866, II, 2; Nev., 1864, II, 1; N. J., 1844, II, 1; Ohio, 1802, IV, 1; 1851, VI; Ore., Ter. Gov., 1848, 5; 1857, II, 2; Penn., 1838, III, 1; Va., 1830, III, 14; 1850, III, 1; 1864, III, 1; W. Va., 1861-3, III, 1; Wis., 1848, III, 1.

<sup>51</sup> Ala., 1864, VII, 2; 1875, VIII; Ark., 1868, VIII, 2; 1874, III, 1; Colo., 1876, VII, 1; Fla., 1868, XV, 1; Ga., 1868, II, 2; Ill., 1870, VII, 1; Iowa, Am. 1868; Kans., 1857, VIII, 1; 1858, II, 1; 1859, V, 1; La., 1868, Sec. 98; Me., 1820, II, 1; Mich., Am., 1870; Minn., 1868, Am. VII, 1; Miss., 1868, VII, 2; Mo., Am., 1870, II, 1; 1875, VIII, 2; Neb., 1875, VII, 1; N. H., 1784, Poore's Charters, p. 1285, 1792, Secs. 13, 28, 42; N. J., 1875, Am. II, 1; N. Y., Am., 1874, II, 1; N. C., 1868, VI, 1; 1876, VI, 1; Penn., 1873, VIII, 1; R. I., 1842, II, 1; S. C., 1868, VIII, 1; Tex., (Coahuila and Texas), 1827, 24—Every citizen; 1836, VI, 11; 1868, III, 1; Tenn., 1870, 1 (citizens); Va., 1870, III, 1.

<sup>52</sup> Wyoming, Colorado, Utah.

<sup>53</sup> Mass., Am., 1857, Art. XX.

<sup>54</sup> Conn., Am. 1855, IX.

<sup>55</sup> La., 1864, III, 15.

Florida,<sup>56</sup> Colorado<sup>57</sup> and Delaware<sup>58</sup> have given authority to the legislature to make such qualifications. The influx of illiterate foreign population, the concentration of these in certain districts, especially in cities, together with the want of intelligence among certain of the "poor whites" and negroes of the South, are conditions that should be met by a more liberal use of this restriction.

Provisions for registration were very few prior to the civil war<sup>59</sup> and most of these requirements till very recently seem to be attributable to the conditions existent in the South after the emancipation of the slave.<sup>60</sup> Whatever this may argue as to their origin or prevalent use, experience has demonstrated that they have been most advantageous. The last decade has witnessed the adoption of such provisions in nearly all the States, for cities and towns.

Disqualification on account of conviction of crime scarcely needs comment, its necessity and wholesome intent being so apparent.<sup>61</sup> The crimes commonly in-

<sup>56</sup> Fla., 1868, XIV, 7—to take effect after 1880.

<sup>57</sup> Colo., 1876, VII, 3—to take effect after 1890.

<sup>58</sup> Dela., 1897, (Am.)—to take effect after 1900.

<sup>59</sup> Kan., 1855, II, 3; 1859, V, 4.

<sup>60</sup> The constitutions making provisions for registration during the first twenty years after the war were: Ala., 1867, VII, 3; 1875, VII, 3; Ark., 1868, VIII, 3; Fla., 1868, 6; Iowa, 1868, II, 6; La., 1864, III, 17; 1868, 99; Md., 1864, I, 2; 1867, I, 5; Miss., 1868, VII, 2; Mo., 1865, II, 4; Am. 1870, II, 1; 1875, VIII, 5; N. C., 1868, VI, 2; 1876, VI, 2; S. C., 1865, IV; 1868, VIII, 3; Va., 1870, III, 4. Considering that all of these states are southern, and that the list comprises nearly all of the southern states there may seem some warrant for the conclusion that the slavery question and reconstruction after the war had some influence in establishing the system.

<sup>61</sup> The constitutions containing such provisions are: Ala., 1819, VI, 5; 1867, VII, 3; 1875, VIII, 3; Ark., 1868, VIII, 3; 1874, 5, 7; Colo., 1876, VII, 10; Fla., 1865, VI, 2 and 3, 1868, XV, 4; Ga., 1777, XI, 1868, II, 3 and 5; Ind., 1816, VI, 4; 1851, II, 6, 10; Ill., 1848, VI, 8; 1870, VII, 7; Kans., 1855, II, 5-10; 1857, VIII, 8; 1858, II, 5-9; 1859, V, 5 and 6; La., 1845, II, 12; 1852, II, 12; 1864, III, 18; 1868, VI, 99, Am., 1870, Sec.

cluded in these provisions are bribery, forgery, perjury, theft and misdemeanors of graver import, besides, in some instances, dueling, fraudulent banking, etc. In fact, all those acts are included which in their nature would indicate such turpitude and disregard for society as to make the exercise of the franchise in their hands prejudicial to the general welfare.

But the provisions for the suffrage have not stopped with a mere grant of the privilege; the right has been protected by various constitutional and statutory provisions, such as the constitutional provisions as to freedom of arrest on election days while attending, going to or coming from elections except for such high crimes as treason, felony, etc.<sup>62</sup> and laws against intimidation, providing for secret ballot and a fair and just count. In

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99; Me., 1820, II, 1; Md., 1851, I, 2-5; 1864, I, 3-8; 1867, I, 2-7; Mass., Am. 1822; Miss., Am. 1859, 1860, 1863, 1868, VII, 2 and 3; Mo., 1865, II, 4-17; Am. 1870, II, 1; Neb., 1864, II, 1; N. J., 1844, II, 1; N. Y., 1821, II, 2; 1846, II, 2; Am., 1874, II, 2; N. C., 1868, VI, 5; 1876, VI, 1-5; Ohio, 1802, IV, 4; Ore., 1857, II, 3-11; R. I., 1842, II, 5; S. C., Am. 1810, 1865, IV; 1868, VIII, 1-8; Tenn., 1834, IV, 3; 1870, I, 5, IV, 2; Tex., 1870, VII, 1; Va., 1830, III, 14; 1850, III, 1; 1864, III, 1; 1870, III, 1-3; Am. 1876, III, 2 and 3; W. Va., 1861, 3, III, 16; Am., 1866, III, 1; 1872, IV, 1; Wis., 1848, III, 2.

<sup>62</sup> Constitutional provisions of this kind are found in the following constitutions: Ala., 1875, VIII, 4; Ark., 1874, III, 4; Ariz., Stat. 1877, Bill of Rights, 24; Colo., 1876, VII, 5; Cal., 1873, II, 2; Del., 1831, IV, 2; Ga., 1877, II, 3; Ill., 1870, VII, 3; Ind., 1851, II, 12; Iowa, 1857, II, 2; Kans., 1859, V, 7; Ky., 1850, II, 9; La., 1879, 189; Me., 1820, II, 2; Mich., VII, 3; Miss., 1869, IV, 7; Neb., 1875, VII, 5; Mo., 1875, VIII, 4; Ore., 1857, II, 13; Ohio, 1851, V, 3; Pa., 1874, VIII, 5; Tenn., 1870, IV, 3; Tex., 1876, VI, 5.

Provisions for freedom from arrest by civil process are found in the following constitutions: Conn., 1818, VI, 8; Minn., 1857, VII, 5; Nev., 1864, II, 4; Va., 1870, III, 4; W. Va., 1872, IV, 3.

In Michigan (Const. 1850), Virginia (Const. 1870), and West Virginia (Const. 1872), voters are not required to attend court on election day as parties or witnesses; in Maine (Const. 1820, II, 3), Ill. (Const. 1870), Iowa (Const. 1857), Mich. (Const. 1850), Neb. (Const. 1875), Ore. (Const. 1857), Va. (Const. 1870), W. Va. (Const. 1872), and Cal. (Am. 1873), the elector is exempt from military duty on election day except in times of war.

fact, the citizen has been accorded every protection for the fair and free exercise of his high prerogative that the ingenuity of man can devise, to the end that an election may be an expression of the will of the majority, irrespective of religion, property, legal or social status, "race, color or previous condition of servitude."

## CHAPTER VII.

PROVISIONS FOR IMPRESSING THE POPULAR  
WILL ON THE GOVERNMENT.

We have so far confined our attention to one side of the State. Taking a broader view, we find that there is another quite as essential, namely, politics.

To many the subject of politics brings with it an unsavory odor. By them all things political are viewed with suspicion, and the word itself accepted as a synonym of corruption. That many vicious practices have been indulged in and allowed we must admit; but there are many who are so accustomed to look only at the blemishes that appear on the surface that they lose sight of the essential truth contained in the subject of their disfavor. Let us not fall into this error, but, taking a comprehensive view, attempt to get at the true relation of politics to the State.

Broadly viewed the state, the body politic, as we understand it, has two essential elements, viz., LAW and POLITICS. The law embraces all those organic structures, all those legislative enactments, established precedents and settled customs that have grown up and been retained by a political people for their orderly conduct one with another. In other words, law is the established order of society, is conservative, is stable, is constitutional, has its foundations in the past. It is the fixed element in the body politic. Politics embraces the active elements of the state, has to do with the popular will, comprehends the political mind, relates to the public spirit. In the past it has given birth to the established law; in the present it would mold and modify the legal

establishments of the past to adapt them to the present and the future. Politics in its true sense is far from being opposed to good government. It involves the very life, all of the higher and nobler aspirations of the nation. The national spirit, its will, its political life, are all within the signification of the term. By the political activity of all its members a nation becomes great; by political inactivity it grows weak and decays. Those grand movements, such as the struggle for our national independence, the heroic activities which laid the foundations and reared the superstructures of our governmental system, the fierce but noble contest of citizens to maintain established institutions and order in both sections during the civil war, as well as the various attempts to remold and recast the rule of law, to adopt new measures better suited to the progress of the age and the protection of the general welfare, are all manifestations of our political life.

In all government which has for its aim the general weal it is necessary to make provision for these activities.<sup>1</sup> The frame of government must so provide for the political activities of a nation that the will of the people may be expressed in an orderly manner and, further, that this expression may, in some safe and orderly way, receive the sanction of law. It is the purpose of this chapter to notice some of the guaranties and devices of our government to this end.

One of the first and most important privileges to be obtained by a political people and guaranteed to them

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<sup>1</sup> The absence of means of expression of the popular will is one of the criteria of an arbitrary government. In fact it has been the aim of absolutism in all ages to suppress all expressions of popular will. The laws against heresy, apostacy, libel, slander, treasonable speech, peaceable assembly, free press, free speech and free thought, are devices to this end. The more absolute the government the more completely is expression of the will of the people repressed. It is only in popular government that we find recognized means of expression.

by their government is the right of peaceable assembly. It is as necessary that the public mind, that spiritual force that guides and moves the body politic, shall be brought into direct communication with all its parts in order that it may avail itself of the experience and know the needs of all members of the state as it is that the human brain shall have such relations with its various parts and hold in contemplation the experiences of all of the organs of the body relative to the environment in which it has lived. Otherwise neither could arrive at judgments useful to the organism which it would serve. True government must be the rational product of social experience. This experience can come from the people only. Those political devices erected to conserve the general welfare must be wrought out by the mature judgment of the political people. To this end popular assemblies are indispensable and the right of peaceable assembly a prerequisite of freedom.

So far as is known to the writer, this right has never been questioned in this country.<sup>2</sup> As if absolutely to preclude it ever being questioned, guaranties were incorporated in many of our early constitutions,<sup>3</sup> and have since come to occupy a place in nearly all.<sup>4</sup>

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<sup>2</sup> There have been some attempts to prevent peaceable assembly, but these attempts have not, so far as is known to the writer, been sustained as resting on right.

<sup>3</sup> Del., 1792, I, 16; Ky., 1792, XII (Poore, 655), 1799, X, 22; Mass., 1780, XIX; N. H., 1784, I, 32; 1792, I, 32; N. C., 1776; Dec. of R., XVIII; Ohio, 1802, VIII, 19; Penn., 1776, Dec. of R., XVI; 1790, IX, 20; Tenn., 1796, XI, 22; Vt., 1777, I, 18; 1786, I, 22; 1793, I, 20; Va., 1782, III, 16.

<sup>4</sup> U. S. Const., Am. I; Ala., 1819, I, 22; 1865, I, 26; 1867, I, 27; 1875, I, 26; Ark., 1836, II, 20; 1864, II, 20; 1868, II, 4; 1874, II, 4; Cal., 1849, I, 10; Colo., 1876, II, 24; Conn., 1818, I, 16; Del., 1831, I, 16; Fla., 1838, I, 20; 1865, I, 20; 1868, I, 11; Ga., 1865, I, 7; 1868, I, 5; Ill., 1818, VIII, 19; 1848, XIII, 21; 1870, II, 17; Ind., 1816, I, 19; 1851, I, 31; Ia., 1846, I, 20; 1857, I, 20; Kans., 1855, I, 3; 1857, B. of R., 18; 1858, I, 3; 1859, B. of R., 3; Ky., 1850, XIII, 24; Me., 1820, I, 15; Mich., 1835, I, 20; Miss., 1817, I, 22; 1832, I, 22; 1868, I, 6; Mo., 1820, XIII,



But under the practices that prevailed in Europe during the latter part of the eighteenth century, such a guaranty in itself would be of little avail. The mere fact of congregation, or aggregation, of people, would be to no purpose for political ends. Communication is necessary. The right to express thought and feeling in oral or written form is essential; therefore the further guaranties of free speech and a free press. To those who have never lived in a land where the government exercised censorial functions, such provisions may seem superfluous, as being only a formal recognition of natural rights. But the colonists themselves had not always been free to speak and write what they thought; England, at the very time of our disaffection and for years preceding it, had been wrought to a fever heat by the persecutions of Wilkes, the prosecution of Wheble, Thompson, et al.;<sup>5</sup> and although for decades the rights

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3; 1865, I, 8; 1875, I, 29; Neb., 1866, I, 4; 1875, I, 19; Nev., 1864, I, 10; N. J., 1844, I, 18; N. C., 1868, I, 25; 1876, I, 25; Ohio, 1802, VIII, 19; 1851, I, 3; Ore., 1857, I, 27; Penn., 1838, IX, 20; 1873, I, 20; R. I., 1842, I, 21; S. C., 1868, I, 6; Tenn., 1834, I, 23; 1870, I, 23; Tex., 1865, I, 19; 1866, I, 19; 1868, I, 19; 1876, I, 27; W. Va., 1872, III, 16; Wis., 1848, I, 4.

<sup>5</sup> Under George III, the abuses of government became such as to stir up the press to opposition. A freedom of press was indulged in that was theretofore unknown. Says May (Const. Hist., of Eng., Vol. II, p. 247, Ed. London, 1889), commenting on the situation, "Lord Bute was the first to illustrate its power. Overwhelmed by a storm of obloquy and ridicule, he bowed down before it and fled. He did not attempt to stem it by the terrors of the law. Vainly did his hired writers endeavor to shelter him; vainly did the king uphold his favorite. The unpopular minister was swept away; but the storm continued. Foremost among his assailants had been the 'North Briton,' conducted by Wilkes, who was not disposed to spare the new minister, Mr. Grenville, or the court.

"On the 23d of April, 1763, appeared the memorable number 45 of the 'North Briton,' commenting on the king's speech at the prorogation, and upon the unpopular peace recently concluded. It was at once stigmatized as an audacious libel, and a studied insult to the king himself; \* \* \* But, however bitter and offensive, it unquestionably assailed the minister rather than the king. \* \* \* A verdict was obtained

of free speech and free press had been accorded in America, yet the possibility of a government assuming to restrain the freedom of its people in this respect demanded that such limitations be imposed on those in power as to make restraint of this kind usurpation. Thus the first State constitution of Pennsylvania, 1776, provided that<sup>6</sup> "The people have a right to freedom of speech and of writing and publishing their sentiments." The Constitution of Virginia, adopted the same year, affirmed that "the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic government."<sup>7</sup> The provision of the Pennsylvania constitution above quoted was incorporated in the early constitutions of Vermont—1777<sup>8</sup> and 1786;<sup>9</sup> and the people of Massachusetts, 1780, inserted among their constitutional guaranties "The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in the commonwealth."<sup>10</sup> This security was also adopted by New Hampshire, 1784.<sup>11</sup>

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against Wilkes for printing and publishing a seditious and scandalous libel. At the same time the jury found his 'Essay on Woman' to be an 'obscene and impious libel.' But the other measures taken to crush Wilkes were so repugnant to justice and decency that these verdicts were resented by the people."

These were but the first of a series of prosecutions instituted against the persistent Wilkes. Williams, one of his printers of "No. 45," was also sentenced to the pillory; this was the occasion for another popular demonstration, which resulted in a popular subscription of \$1,000 in his behalf. R. Thompson, of "The Gazetteer, and New Daily Advertiser," and R. Wheble, of the "Middlesex Journal," were prosecuted, 1771, for printing debates of Parliament. The printers of six other newspapers fell into like disfavor, and official persecutions of a repressive character became so common as to work up the people almost to a point of insurrection.

<sup>6</sup> Const. 1776, Dec. of Rights, XII.

<sup>7</sup> Const. 1776, Bill of Rights, 12.

<sup>8</sup> Const. 1777, II, 32.

<sup>9</sup> Const. 1786, I, 15.

<sup>10</sup> Mass. Const., 1780, I, 16.

<sup>11</sup> N. H. Const., 1784, I, 22.

In several of the new State formations during the revolutionary period, guaranties against their own government was scarcely thought of. Some are entirely devoid of a bill of rights, and had they remained independent it is probable that such provisions would at first have been less frequently employed.<sup>12</sup> The organization of a federal government, however, revived the fear of governmental encroachments that had darkened the history of England and other European nations. The States adopting the federal constitution demanded additional guaranties,<sup>13</sup> and first among these is found the guaranty that "Congress shall make no law \* \* \* abridging the freedom of speech or of the press, or of the right of the people peaceably to assemble."<sup>14</sup>

The federal government, having been restrained, it only remained for the people of the several States in framing their various constitutions, to impose such limitations there as they thought necessary. In Pennsylvania, 1790, the limitations relative to free speech and free press took the following form: "That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof."<sup>15</sup> The free communication of thoughts

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<sup>12</sup> The constitution of the United States, as it left the constitutional convention, contained very few of the guarantees commonly found in a bill of rights. The necessity for such provisions seems to have been little felt by the delegates.

<sup>13</sup> In the contest between the parties favoring and opposing the adoption of the federal constitution, the lack of guarantees for the freedom of the citizen against repressive acts on the part of the general government appealed to the people with such force that it was only after an understanding was had that such guaranties would be adopted as amendments that the federal scheme finally became operative.

<sup>14</sup> Const. of the U. S., Am. I.

<sup>15</sup> This may be directly attributable to the agitation concerning Wilkes, Wheble, Thompson, et al. No one was more thoroughly impressed with the necessity of such a guaranty than Franklin.

and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."<sup>16</sup> In Kentucky<sup>17</sup> (1792, 1799 and 1850), Delaware<sup>18</sup> (1792 and 1831), Ohio<sup>19</sup> (1802), Indiana<sup>20</sup> (1816) and Illinois<sup>21</sup> (1818 and 1848) these guaranties took the same form. In others the special privilege granted to "persons who undertake to examine the proceedings of the legislature or any branch of government," was eliminated, and only the more general guaranty expressed, that "every citizen may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of that liberty."<sup>22</sup> Or, that "the free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write or print on any subject, being responsible for the abuse of that liberty."<sup>23</sup> In nearly all some form of limitation is at present found.

These guaranties, however broad and sweeping they

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<sup>16</sup> Penn. Const. 1790, IX, 7.

<sup>17</sup> Ky. Consts. 1792, XII; 1799, X, 7; 1750, XIII, 9.

<sup>18</sup> Del. Consts. 1792, I, 5; 1831, I, 5.

<sup>19</sup> Ohio, Const., 1802, VIII, 6.

<sup>20</sup> Ind. Const., 1816, I, 9.

<sup>21</sup> Ill., Consts., 1818, VIII, 22; 1848, XIII, 23.

<sup>22</sup> Ala., 1819, I, 9; 1865, I, 5; 1867, I, 6; 1875, I, 5; Cal., 1849, I, 9; Colo., 1876, II, 10; Conn., 1818, I, 5; Fla., 1838, I, 5; 1865, I, 5; 1868, I, 10; Ga., 1865, I, 6; 1868, I, 9; Ill., 1870, II, 4; Ind., 1851, I, 9; Kans., 1855, I, 11; 1857, B. of R., 7; 1858, I, 11; 1859, B. of R., 11; Ia., 1846, I, 7; 1857, I, 7; La., 1852, 106; 1845, 110; 1864, 111; 1868, I, 4; Me., 1820, I, 4; Md., 1864, B. of R., 40; 1867, B. of R., 40; Mich., 1835, I, 7; Minn., 1857, I, 3; Miss., 1817, I, 6; 1832, I, 6; 1868, I, 4; Mo., 1875, II, 14; Neb., 1866, I, 3; 1875, I, 5; Nev., 1864, I, 9; N. J., 1844, I, 5; N. Y., 1821, VII, 8; 1846, I, 8; Ohio, 1851, I, 11; Ore., 1857, I, 8; Penn., 1776, B. of R., XII; S. C., 1868, I, 7; Tex., 1845, I, 5; 1866, I, 5; 1868, I, 5; 1876, I, 8; Vt., 1777, I, 14; 1786, I, 15; 1793, I, 13; Va., 1870, I, 14; Wis., 1848, I, 3.

<sup>23</sup> Ark., 1836, II, 7; 1868, I, 2; 1874, II, 6; Ill., 1818, VIII, 22; 1848, XII, 23; Ind., 1816, I, 9; Ky., 1892, XII; 1799, X, 7; 1850, XIII, 9; La., 1812, VI, 21; Mo., 1820, XIII, 16; 1865, I, 27; Penn., 1790, IX, 7; 1838, IX, 7; 1873, I, 7; Tenn., 1796, XI; 1817, I, 19; 1834, I, 19.

may seem, did not give the desired protection. In most of them, it may be noticed, such a clause as "being responsible for the abuse of that liberty" may be found. Under the common and statute law of England this responsibility was more than an ordinary American wished to assume. The laws against apostasy, heresy, non-conformity, and opposing the ordinances of the established church, against libel and treason, and the severity of government in construing these laws, were such as to make it necessary to give definition to what might be considered an "abuse." Under the regime of absolutism, from which the State was at that time rapidly emerging, every force had been employed in the interests of those in power. They owed their position to conquest; and it was of highest importance to them that the established polity should not be disturbed. One of the most powerful influences brought to bear upon the people, to this end, was the church. The teachings were framed to protect the established order; therefore apostasy, that is, "a total renunciation of Christianity, by embracing a false religion, or no religion at all," was made a crime.

Says Blackstone:<sup>24</sup>

We find by Bracton that in his time apostates were to be burnt to death. \* \* \* \* \* Yet the loss of life is a heavier penalty than the offense, taken in civil light, deserves. \* \* \* \* \* This punishment, therefore, has long become obsolete; and the offense of apostasy was for a long time the object only of ecclesiastical courts. \* \* \* \* \* But about the close of the last century the civil liberties to which we were then restored being used as a cloak of maliciousness, and the most horrid doctrines, subversive of all religion, being publicly avowed, both in discourse and writings, it was thought necessary again for the civil power to interpose by not admitting those miscreants (*mescroyntz*, in our

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<sup>24</sup> IV Blackstone, Sec. 44.

ancient law, is the name of unbelievers) to the privileges of society who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 and 10, William III., C. 32, that if any person educated in or having made profession of the Christian religion shall, by writing, printing, teaching or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall, for the first offense, be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee or purchaser of lands, and shall suffer three years' imprisonment without bail.

For the same reason heresy also came under the ban. This crime consisted "not in a total denial of Christianity, but of some of its essential doctrines publicly and obstinately avowed."<sup>25</sup> What should be adjudged heresy was left to the ecclesiastical court, which had almost arbitrary power, and these courts, being dependent on the government rather than answerable to the people, were used by the powers to their own ends.

What ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the sanctimonious hypocrisy of the canonists went at first no farther than enjoining penance, excommunication and ecclesiastical deprivation for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods in pios usus. But in the meantime they had prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal but even a capital offense<sup>26</sup> \* \* \* by statute 9 and 10, William III., C. 32, if any person educated in the Christian religion or professing the same shall, by writing, printing, teaching or advised speaking, deny any

<sup>25</sup> IV Blackstone, Sec. 45.

<sup>26</sup> The making of the offense capital often caused the estates of the condemned to revert to their prosecutors.

one of the persons in the Holy Trinity to be God, or maintain that there are more gods than one, he shall undergo the same penalties to be inflicted on apostasy by the same statute.<sup>27</sup>

A national church having been established, non-conformity deprived one of many of the rights of citizenship.

Says the commentator:

If through weakness of intellect, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishments, the civil magistrate has nothing to do with it, unless their tenets and practice are such as to threaten ruin or disturbance with the State. He is bound, indeed, to protect the established church; and if this can be better effected by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do.<sup>28</sup>

Opposing or reviling the ordinances of the established church was considered

A crime of much grosser nature than mere non-conformity, since it carries with it the utmost indecency, arrogance and ingratitude; indecency by setting up private judgment in virulent and factious opposition to public authority; arrogance by treating with contempt and rudeness what has at least a better chance to be right than the singular notions of any particular man; and ingratitude by denying that indulgence and undisturbed liberty of conscience to the members of the established church which the retainers of every petty conventicle enjoy.<sup>29</sup>

Such were the restrictions at common law upon speech, press and action relative to the established church.

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<sup>27</sup> IV Blackstone, Secs. 45-50.      <sup>28</sup> IV Blackstone, 53.

<sup>29</sup> IV Blackstone, 51.

In the same manner the sovereign wove about himself and courtiers the legal fabric of treason. It is written by Plutarch that Dionysius executed a subject for having dreamed that he had killed him. Edward IV. convicted a citizen of London for having said that he would make his son heir to the crown—this, the crown, being the symbol of the house in which they lived;<sup>30</sup> and again another, whose favorite buck had been killed by the King while hunting, was convicted of treason for wishing it horns and all in the King's belly.<sup>31</sup> In order to guard the King's household against suspicion of bastardy, it was made treason "if a man do violate the King's companion (wife), or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir;"<sup>32</sup> so also copying the King's great and private seal,<sup>33</sup> and counterfeiting the King's money,<sup>34</sup> etc. The lengths to which the King might go in this particular, and the indefiniteness of the law makes it plain that this power would be a menace to the popular liberty.

Another class of acts that would be considered an "abuse," for which the citizen would be held responsible, falls under what was known to the common law as libel. Says Cooley:<sup>35</sup>

At the common law it was indictable to publish anything against the constitution of the country, or the established system of government. The basis of such a prosecution was the tendency of publications of this character to excite disaffections with the government, and thus induce a revolutionary spirit. The law always, however, allowed a calm and temperate

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<sup>30</sup> IV Blackstone, Sec. 80.

<sup>31</sup> Id., 80.

<sup>32</sup> Id., 81.

<sup>33</sup> Id., 84.

<sup>34</sup> Id., 83.

<sup>35</sup> Cooley, Const. Lim., Sec. 427. See, also, Hallam's Const. Hist. of England, Vol. II, p. 376-7 (New York Ed).



discussion of public events and measures, and recognized in every man a right to give any public matter a candid, full and free discussion. It was only when a publication went beyond this that it became criminal. It cannot be doubted, however, that the common law rules on this subject were administered in many cases with great harshness. This was especially true during the long and bloody struggle with France at the close of the last and beginning of the present century, and for a few subsequent years, until a rising public discontent with political prosecutions began to lead to acquittals.

The same may be said of slander. The fact that what was spoken, written or published was true was no excuse. The greater the truth the greater the crime, for if there be great truth in the statements then there was so much the more danger of the people becoming disaffected with the established order, and of being moved to action in opposition to the government.

These shackles, imposed by a despotic government upon the people to sustain an order established for the benefit of the rulers during a regime of conquest, were stricken out and doomed to perpetual disuse by our written constitutions. All religious restraint was removed; treason was defined, and the people protected from prosecutions for libel. The fundamental theory of our government is such as to preclude such restraints. As to religion, it has come to be the established doctrine. "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other. That no man ought of right to be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry contrary to

or against his own free will and consent." The church and State have been forever separated in our polity. Treason has been defined as consisting "only in levying war against the government, or in adhering to its enemies or giving them aid or comfort." For the protection of the people against prosecutions for libel provisions have been made, such as: "In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the subject matter charged as libelous is true, and was published with good motives and for justifiable ends, the party charged shall be acquitted."<sup>36</sup> In many of the constitutions, in order that prosecutions of this kind shall be taken out of the hands of the organized departments of government, as far as possible, it is further provided that "the jury shall have the right to determine the law and the fact."<sup>37</sup> While in others the guaranty is still further extended by including "all suits and prosecutions," civil and criminal.<sup>38</sup>

So much for the constitutional guaranties of peaceable assembly and free intercourse among the people on all subjects pertaining to the general welfare. We now turn our attention to the main purpose of these guaranties. The end in view is not the satisfaction that may be derived by the people from speaking, writing or print-

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<sup>36</sup> Ark., 1874, II, 6; 1868, I, 2; Fla., 1868, I, 10; Ill., 1818, VIII, 23; 1848, XIII, 24; Ind., 1816, I, 10; Iowa, 1846, I, 7, 1857, I, 7; Kans., 1855, I, 11, 1858, I, 11, 1859, B. of R., 11; Neb., 1875, I, 5; Nev. 1864, I, 9; Ohio, 1851, I, 10.

<sup>37</sup> Cal., 1849, I, 9; Del., 1792, I, 5, 1831, I, 5; Ind., 1816, I, 10; Ky., 1792, XII, 1799, X, 8; 1850, XIII, 10; Me., 1820, I, 4; Mich., I, 7; Miss., 1817, I, 8; 1832, I, 8; Neb., 1866, I, 3; N. J., 1844, I, 5; N. Y., 1821, VII, 8, 1846, I, 8; Ohio, 1802, VIII, 6; Penn., 1790, IX, 7, 1838, IX, 7, 1873, I, 7; Tenn., 1796, XI, 19; 1834, I, 19; 1870, I, 19; Tex., 1845, I, 6; 1866, I, 6; 1868, I, 6; 1876, I, 8; Wis., 1848, I, 3.

<sup>38</sup> Colo., 1876, II, 10; Conn., 1818, I, 5; Ga., 1868, I, 19; Ill., 1870, II, 5; Mo., 1820, XIII, 16; 1865, I, 27; Mo., 1875, II, 14; R. I., 1842, I, 20.

ing—rather, that their will, having by free discussion taken definite form, may be expressed in law. What are the means provided by our government whereby the will of the people may be expressed in forms of law? One of the direct means is found in the constitutional guaranties of popular assembly, a very common form of which is as follows: “The citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.”<sup>39</sup> Here we have stated the rights of petition. Another common form is that “the right of the people peaceably to assemble, to consult for the common good, to petition, by address or remonstrance, the government, or any department thereof, shall never be abridged,”<sup>40</sup> and again, “the citizens have a right, in a peaceable manner, to assemble together for the common good, to instruct their representatives,” etc.<sup>41</sup> In these we not only have the guarantee of the right of petition, but also the right of party organization clearly expressed. The direct methods of making the popular will known to governmental agents are at least two, i. e., by petition and by instruction. The former

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<sup>39</sup> Ala., 1819, I, 22; 1865, I, 26; 1867, I, 27; 1875, I, 26; Colo., 1876, II, 24; Conn., 1818, I, 16; Del., 1792, I, 16; 1831, I, 16; Fla., 1838, I, 20; 1865, I, 20; Ky., 1892, XII (Poore, 655); 1799, X, 22; 1850, XIII, 24; Miss., 1817, I, 22; 1832, I, 22; 1868, I, 6; Mo., 1820, XIII, 3; 1865, I, 8; 1875, I, 29; Neb., 1866, I, 4; Tex., 1865, I, 19; 1866, I, 19; 1868, I, 19; 1876, I, 27.

<sup>40</sup> Ark., 1874, II, 4; Cal., 1849, I, 10; Fla., 1868, I, 11; Ill., 1818, VIII, 19; 1848, XIII, 21; 1870, II, 17; Ind., 1816, I, 19; 1851, I, 31; Ia., 1846, I, 20; 1857, I, 20; Kans., 1855, I, 3; Kans., 1857, B. of R., 18; 1858, I, 3; 1859, B. of R., 3; Me., 1820, I, 15; Mass., 1780, XXIX; Mich., 1835, I, 20; Neb., 1875, I, 32; N. H., 1784, I, 32; 1792, I, 32; N. J., 1844, I, 18; N. C., 1776, Dec. of R., XVIII; 1868, I, 25; 1876, I, 25; Ohio, 1802, VIII, 19; 1851, I, 3; Ore., 1857, I, 27; Penn., 1776, Dec. of R., 8; Vt., 1777, I, 18; 1786, I, 22; 1793, I, 20; W. Va., 1872, III, 16; Wis., 1848, I, 4.

<sup>41</sup> Ark., 1836, II, 20; 1864, II, 20; 1868, II, 4; Kans., 1857, B. of R., 18; Tenn., 1796, XI, 22; 1834, I, 23; 1870, I, 23.

takes a non-partisan form and appeals for certain desired measures directly to those in power, and is often very effective in influencing legislative action, either to make known particular wants, or to thwart measures that seem opposed to the public welfare.<sup>42</sup> The latter finds expression in "party platforms" and pre-election pledges. The people holding to certain political tenets meet together, form a "platform," or a statement of principles, and then nominate candidates to stand for election on this platform. The candidate, though not legally bound to follow these instructions, is bound on honor and party faith to direct all his effort toward the fulfillment of the pledges of the party, though as to measures which do not fall within these pledges he is entirely free.

The indirect method by which the popular will may be impressed on the government is through the representatives—persons chosen by the people of a definite community to represent their interests in legislative assemblies and on administrative boards.<sup>43</sup> That the popular representatives might be free to voice their own sentiment and that of the constituency, the safeguards and

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<sup>42</sup> So far as the writer is informed no attempt was ever made by the government to overthrow or deny the right of petition except during the fierce slavery agitation in Congress about 1837 and later. See Congressional Record, 1837, et seq.

<sup>43</sup> The power of the electorate over the representatives is largely due to our system of short tenures. It is claimed by many that, by reason of his desire to please his constituency and thereby obtain their suffrages at the next election, the officer is made even too subservient to the popular will; that he becomes a follower rather than a leader of popular opinion. Be that as it may, the history of all popular government has demonstrated the fact that this method, though indirect, is one of the most forcible means of impressing the popular will on the government. Before the reform act in England, Parliament was subservient to the interests of the property and governing classes. After the reform acts, when the electorate was broadened to include a wide range of population, the laws immediately took on a different spirit, and government became very distinctly democratic.

privileges enjoyed by the British Parliament were invoked here. For example, in Maryland, 1776,<sup>44</sup> it was provided "that freedom of speech and debates or proceedings in the legislature ought not to be impeached in any other court or jurisdiction."<sup>45</sup> In the Articles of Confederation, 1777, the guarantee was given that "freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrest and imprisonment during the time of their going to and from, and in attendance on Congress, \* \* \* except for treason, felony or breach of the peace."<sup>46</sup>

In Massachusetts, 1780,<sup>47</sup> "the freedom of deliberation, speech and debate in either house of the legislature is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."<sup>48</sup> The constitution of the United States, 1787, privileges senators and representatives from arrest "during their attendance at the sessions of their respective houses, and in going to and coming from the same,"<sup>49</sup> and most of the constitutions have provisions of like purport.

Not only are the representatives given immunity from prosecution for utterances and acts while serving the people in official capacity, but the proceedings of the government are made public, so that the people may know how their agents are serving them. The provisions requiring the legislature "to keep a journal of its

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<sup>44</sup> Md. Const., 1776, Dec. of R., VIII.

<sup>45</sup> This without doubt was taken from the English law.

<sup>46</sup> Articles of Confederation, V.

<sup>47</sup> Const. 1780, Pt. I, XXI.

<sup>48</sup> This was followed in N. H., 1784; Vermont, 1786.

<sup>49</sup> Const. of U. S., I, 6.

proceedings, and from time to time to publish the same, except such parts as in their judgments require secrecy," was an innovation on European practice in the interest of popular rights and power.<sup>50</sup>

In all these provisions it may be noticed that the people could take no authoritative part in acts of government whereby their will might be formulated and given expression in such a manner as to have the sanction of law. They were granted the right peaceably to assemble, and having assembled, to communicate their thoughts; they were given the right to "consult for the common good;" they were accorded freedom of speech and press; they were protected against the arbitrary prosecution of government for treason; they were relieved from oppressive prosecutions for libel and slander; they were freed from the fictions of heresy, apostasy, non-conformity and other restraints on religious thought and action. They were accorded the right "to apply to those invested with powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance." They were given power "to instruct their representatives." Finally the repre-

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<sup>50</sup> "By a fiction not very far removed from the truth, the Parliament was supposed to sit with closed doors. No official publication of its debates was provided for, and no other allowed. (In 1641 Sir Edward Deering was expelled and imprisoned for publishing a collection of his own speeches, and the book was ordered to be burned by the common hangman.) The brief sketches which found their way into print were usually disguised under the garb of discussions in a fictitious Parliament held in a foreign country. Several times the Parliament resolved that any such publication, or any intermeddling by letter-writers, was a breach of their privileges, and could be punished accordingly upon discovery of the offenders. For such a publication in 1747 the editor of the "Gentleman's Magazine" was brought to the bar of the House of Commons for reprimand, and only discharged on expressing his contrition. The general publication of Parliamentary debates dates only from the American revolution, and even then was still considered a technical breach of privilege."—Cooley, Const. Lim., Sec. 418.

sentatives were made responsible to the people at large for their official acts; re-election was made dependent on subservience to the popular will, and in order that the people might know what these official acts have been, the government was required to publish a record of proceedings.

The next step in the evolution of popular representative government was to provide the means whereby the popular will might be impressed on the government by authoritative act of the people themselves. This means has come to be known as the "popular initiative," a device whereby the people may initiate acts of government without being dependent on the will or caprice of their official servants.

Among the first instances of the use of the popular initiative in general government in this country was that employed in Rhode Island. In 1647 the town of Providence sent a "committee" to Portsmouth to meet with a committee from the other towns to form a "common government."<sup>51</sup> The plan of government devised by these committees was one in which laws of general importance were required to be initiated in some town meeting, and notice thereof given to the other towns. The other towns approving of the measure, they reported their action to the next general court of legislature through their committees. If the measure passed the legislature the law was then referred back to the people for ratification at the next general assembly of all the people. Other forms of initiative may be found in the colonial governments.

In the first State constitutions several provisions for "popular initiative" of the amendments are found. For example, the Georgia constitution of 1777, Art. LXIII, provides: "No alteration shall be made in the constitu-

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<sup>51</sup> Town Government in Rhode Island (Foster), p. 19: 1 Rhode Island Col. Rec., 42. See, also, *supra*, Chap. II, p. 59.

tion without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of the voters in each county in the State; at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made according to the petitions referred to the assembly by the majority of the counties as aforesaid."

Massachusetts—Const. 1780, Art. V, Chap. VI—had the following device: "The general court, which shall be in the year of our Lord one thousand seven hundred ninety-five, shall issue precepts to the selectmen of the several towns and to the assessors of the unincorporated plantations directing them to convene the qualified voters of their respective towns and plantations for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to amendment. And if it shall appear by the returns made that two-thirds of the qualified voters throughout the State \* \* \* are in favor of such revision or amendment the general court shall issue precepts \* \* \* to the several towns to elect delegates to meet in convention for the purpose aforesaid."

The subjects in which the popular initiative has been most frequently employed have been those pertaining to local government. The provisions for popular initiative in local government have been of two kinds, viz., constitutional and statutory.

The constitutional provisions have been confined largely to the division of counties,<sup>52</sup> the relocation of county seats,<sup>53</sup> the incorporation of cities and

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<sup>52</sup> Const. of S. C., 1895, VII, 1, 2.

<sup>53</sup> Constitution of South Dakota, 1889, Art. IX, Sec. 3, provides: "Whenever a majority of the legal voters of any organized county shall petition the county board to change the location of the county seat, which has once been located by a majority vote, specifying the place to which it is to be changed, said county board shall submit the same to the people of said county at the next general election."



towns,<sup>54</sup> the establishment of new courts,<sup>55</sup> etc.

Statutory provisions for popular initiative have been used for a variety of subjects, as the impounding of stock in cities and towns,<sup>56</sup> the sale of school lands,<sup>57</sup> the support of paupers,<sup>58</sup> the organization of cities and towns,<sup>59</sup> minority representation,<sup>60</sup> the establishment of public libraries,<sup>61</sup> matters concerning road tax,<sup>62</sup> the sale of liquors,<sup>63</sup> the amount of license,<sup>64</sup> internal improvement,<sup>65</sup> police.<sup>66</sup>

In general we may say that both the negative and positive provisions for impressing the popular will on the government have been constantly enlarging; that the devices that have proved themselves most efficient to this end have been retained and more largely employed in all the States; that it has been the general drift of popular thought to make the government both responsible and responsive.

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<sup>54</sup> Constitution of South Carolina, 1895, II, 13.

<sup>55</sup> The constitution of W. Va., Art. VIII, Sec. 29, had the following: "The legislatures shall, on application of any county, reform, alter or modify the county court established by this article, in such county and lieu thereof with the consent of a majority of the voters of such county voting at an election, create another tribunal for the transaction of the business required by the county court created by this article," etc.

<sup>56</sup> See Statutes of Ark., Mo., Ill., Kans. and Tex.

<sup>57</sup> See Statutes of Arkansas.

<sup>58</sup> See Statutes of Illinois.

<sup>59</sup> Stat. of Ill.

<sup>60</sup> Id.

<sup>61</sup> Stat. of Mo.

<sup>62</sup> Stat. of Ill.

<sup>63</sup> Stat. of Miss., N. J., N. C., O., Va.

<sup>64</sup> Stat. of Wis.

<sup>65</sup> Stat. of Neb.

<sup>66</sup> Stat. of Nev.

## CHAPTER VIII.

POPULAR CO-OPERATION IN LEGISLATION AND  
ADMINISTRATION (I) UNDER THE UN-  
WRITTEN CONSTITUTION.

Since the establishment of representative government, provisions for popular co-operation in legislation and administration have been of two kinds, viz., those made by the legislative branch of government and those made by the constituent assembly—the constitutional convention. The first class of provisions is found in the statutes, the second in the written constitutions. In both co-operation takes the form of the referendum. Chronologically the statutory provisions appear first; for this reason they will be first considered.

In establishing a federal government it became necessary to have a federal constitution.<sup>1</sup> By experience it had been found that a league, based on treaty, was wholly inadequate. A central government was needed having power to act and power to bind all of the States by its acts, even to the extent of coercion. To give a central government such powers, however, would be most dangerous unless the extent of those powers and the manner of their exercise are defined and limited. The creation, definition and limitation of these powers required a written constitution that could not be changed by the ordinary acts of government.

The establishment of a federal constitution must, in

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<sup>1</sup> This fact was recognized by the German people in the formation of the Empire, and by the Swiss in the establishment of their federal government. The same fact must be recognized and adopted by Britain before a federated government, broad enough to include the colonies, will be possible.

the nature of things, modify the constitutions of the several governments federated.<sup>2</sup> Therefore, by the very act of adopting the constitution of the United States, the constitutions of all of the several States were modified. The people had made for themselves a new government throughout; a government in which certain powers were given to the federal government and certain powers were retained by the States. But the people of the several States, having suffered from the uncertainty and absolutism of the British constitution, had, prior to the adoption of the federal form, also placed above the State governments a higher written law adopted by constituent assemblies. These constitutions, as modified by the adoption of the federal plan, were for the time being retained. In so far as the federal and State constitutions so adopted did not provide for the organization and exercise of powers of government, the unwritten constitution remained in force.<sup>3</sup> By the unwritten consti-

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<sup>2</sup> The result will be the same whether the several States have written or unwritten constitutions. The federal constitution, being the highest law, in so far as it applies, all the inferior constitutions are modified to that extent, and there is a new frame of government established throughout the federated empire. It was a failure to recognize this fact that caused so much controversy over "State sovereignty."

<sup>3</sup> Mr. Dicey in "The Law of the Constitution," p. 22, defines constitutional law as follows: "Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or exercise of the sovereign power of the State. Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise this authority."

Mr. Cooley defines a constitution as "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised." \* \* \* "The fundamental law of a State \* \* \* regulating the division of the sovereign powers and directing to what persons each of these powers is to be confined, and the manner in which it is to be exercised." But later the same author says: "In American constitutional law the word constitution is used in a restricted sense, as implying the written instrument agreed upon by the people of the

tution the legislature had full power to make such constitutional provisions and modifications as it wished. In so far, however, as the law was not declared by the legislature the common law, judicial precedents and immemorial customs were recognized as the established order.

The constitution of government in the United States after the adoption of the federal plan, stated in order of precedence, was made up as follows:

1. "The constitution of the United States" in so far as it applied.

2. The "constitutions" of the several States in so far as they made provision for the structure and exercise of the powers of government. (These, the federal and State "constitutions," were superior to the government, having been adopted by constituent assemblies, and were of equal force; each was supreme within its respective sphere, but subordinate within the sphere of the other.)

3. The constitutional provisions of statutes of the United States and the State governments within their several spheres.

4. The constitutional rules of common law and judicial precedent.

5. The constitutional rules contained in immemorial

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union or of any one of the States." This later "American" use of the word is wholly illogical and has led to many erroneous conclusions. There is no reason why the provision made for the office of State comptroller or auditor when found in a "written instrument" agreed upon by the people, should be held constitutional, and an identical provision found in the statutes, when "the people" have delegated the power of making such provision to the legislature not constitutional. From every logical standpoint, all provisions regulating the division of the sovereign powers, directing to what persons these powers are to be confined, and the manner in which they are to be exercised, are equally constitutional provisions, whether found in the "written instrument," the statutes, the common law or the immemorial customs of an office.

customs of office and government. In 1787 the powers of government were established and have since been exercised under and according to this complex constitution. Considering the constitutionality of an act, it must be tested by these rules and according to their precedence.<sup>4</sup> The first two forms of constitutional law we will call the written constitution because contained in certain definite "written instruments." The last three forms of constitutional law we will, for convenience, call the unwritten constitution because dependent on an unwritten or customary exercise of power.<sup>5</sup>

By the written constitution the legislative powers in the federal government were given to Congress,<sup>6</sup> and the legislative power of the several States was given to the several State legislatures.<sup>7</sup> These were made the constitutional organs, the only lawful agents of the State for the enactment of the general laws of the State and the nation. Any attempt made by any other organ

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<sup>4</sup> If a sheriff has performed some act and his power has been questioned, the determination of his powers and test of their legal exercise would be found in these rules. If his act were supported by any of them, and did no violence to a higher rule, his act would be held valid.

<sup>5</sup> While statute law is written, the rule for the exercise of the power which gives it validity, in so far as not contained in the written constitution, is wholly a matter of unwritten or customary law. It may be said to be a common law, or inherent power of the legislature

<sup>6</sup> "All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."—Constitution of the United States, Art. I, Sec. 1.

This is modified by the power of the President to veto or approve, *id.*, Art. I, Sec. 7.

<sup>7</sup> The general form of the constitutional provision for the States is "The legislative power shall be vested in the General Assembly (legislative) which shall consist of a Senate and a House of Representatives." In nearly all of the States, however, the governor is made a part of the legislature in so far as that he is required to exercise the power of approval or veto.

or body to make general laws and any attempt made by these agencies to delegate the exercise of their powers specifically granted, would be null and void. Therefore, except as might be specifically provided within these constitutions, no statute providing for popular co-operation in general legislation for the several States or the United States would be valid.

As to the local administrative subdivisions of the United States and the several States there were few provisions made in the written constitutions for their organization and government. Therefore, concerning the organization and powers of all local and administrative agents not specifically provided for in the written constitutions the government was left free to act according to the unwritten constitutions.

As has already been observed, it had been quite customary in the original small communities to govern by popular assembly. After the political organization had so broadened that it became inconvenient for all of the people within one jurisdiction to assemble, the representative plan was adopted. In the organization of the complex and concentrically widening system of government, composed of the ward or school district, the town or township, the county, the legislative or judicial district, the State, the Empire, the popular assembly was still retained for the school district, the New England town and the township, but as to all other subdivisions was abandoned. In these, however, it was often desirable to consult the will of the people relative to particular legislative and administrative acts. In so far as there were no special provisions in the written constitution for the organization and exercise of powers in these jurisdictions, the legislature of the State under the unwritten constitution had full sway. By virtue of this fact provisions were very commonly made by the legislatures for an expression of the popular will for

popular co-operation in acts of local legislation and administration.

The most prevalent form of popular co-operation in acts of legislation and administration in the early period was that providing for the initiation of these acts by petition. This appeared in the incorporation of towns, the organization of school districts, towns, counties, etc., borrowing of money, subscription to stock in business corporations and public improvements. Gradually, however, as the governing bodies came to be less in touch with the people, the referendum was more frequently used.

The only instance of the use of the referendum under the federal government that the author has found is that provided for in the act of July 9, 1846, for the recession of a part of the District of Columbia to the State of Virginia. By this act Congress submitted to the qualified electors of the district the question of recession, provided the machinery for election, and enacted that if a majority of the electors should be against accepting the provisions of this act, it should be void and of no effect; but if a majority of votes should be in favor of accepting, then it should be in full force. In that event it was made the duty of the President to inform the governor of the cession so made.

The subjects of referendal provisions made by the legislatures of the States during the first fifty years of our national life were comparatively few. Some of them indicate a transition from the popular assembly to the general act, with local option provisions, as, for example, the school law of Maine, passed at the first session of the legislature after it became a State.<sup>8</sup> The provisions are as follows:

Be it further enacted, That the several towns and

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<sup>8</sup> *Laws of Maine*, 1822, p. 404, sec. 7, et seq.

plantations be, and hereby are, authorized and empowered to determine the number and define the limits of the school districts within the same. \* \* \*

That the inhabitants of any school district qualified to vote in town affairs be, and they hereby are, empowered, at any district meeting called in manner herein provided, to raise money for the purpose of erecting, repairing, purchasing or removing a school house and of purchasing land upon which the same may stand, and utensils therefor, and to determine whether the said school house shall be erected or located in said district; and also to determine at what age the youth within such district may be admitted into a school kept by a master or mistress, and whether any scholars shall be admitted into such school from other school districts.

In case the people voted in favor of these propositions certain other provisions might be invoked to carry these first, or optional provisions, into effect.

To the same purpose was Act No. 143, Laws 1826, of Massachusetts, one section of which recites: "The inhabitants of every town may, if they shall think it expedient, carry into effect the provisions of the twenty-eighth section, at the common expense of the town so far as relates to providing school houses for the school districts of the town." The decision having been made, then certain other provisions relative to the manner of raising taxes would become effective.

During the same year the legislature of Maryland passed "an act for the establishment and support of public free schools in the first election district of Baltimore county,"<sup>9</sup> which was purely referendal. The preamble is as follows: "Whereas, it has been justly represented by the inhabitants of the first election district of Baltimore county to the legislature of Maryland that a system of public free schools, which should be supported by a scale of taxation and depend for its opera-

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<sup>9</sup> Laws 1826, Mar. 1, Chapter 142.



tion within said district upon the future decision of a majority of the voters at the time actually residing in such district," etc. The law then provides for a free school system subject to adoption by a vote of the majority of the electors.

In 1825 the legislature of Maryland passed a referendal act for the establishment of a system of primary schools. Sections 29 and 30 are as follows:

Be it enacted, That at the next election of delegates of the General Assembly, every voter, when he offers to vote, shall be required by the judges of election to state whether he is for or against the establishment of primary schools, and make return thereof to the legislature during the first week of the session, and if a majority of the said votes in any county shall be in favor of the establishment of primary schools, as herein provided for, then, and in that case, the said act shall be valid for such county or counties, otherwise of no effect whatever.

And be it enacted, That if a majority of the voters of any county in the State shall be against the establishment of primary schools, then, in that case, the said act shall be void as to that county.

In 1816 an election was held in that part of Massachusetts afterward set off as the State of Maine for the purpose of determining whether the people favored a separation from the old State, and in 1819 the legislature of Massachusetts authorized an election on the question of whether the "District of Maine should become a separate and independent State," the condition being that, in case the proposition received 1,500 votes, a convention should be chosen to frame a constitution.

In 1826 the legislature passed a law fixing the jurisdiction of the courts of Boston, which provided that a favorable vote of the people of the city be had before it should go into effect.

In 1833 and 1835 the Virginia legislature passed two

acts allowing the city of Richmond to subscribe to the capital stock of a canal company, but requiring a petition of a majority of the electors as a condition precedent to the legal action on the part of the city officers. This was a measure which may be considered a provision transitional between the initiatory petition and referendal vote, the method being the same as in the former and the result the same as in the latter.

As the sentiment against the liquor traffic became strong the referendum was employed as a means of obtaining popular expression on the adoption of local liquor laws. For example, in Rhode Island by the act of 1845 provision was made that "no licenses shall be granted for the retailing of wines or strong liquors in any town or city in the State, when the electors of such town or city qualified to vote for general officers, shall, at the annual town or ward meeting held for the election of town officers, decide that no such licenses for retailing as aforesaid shall be granted for that year." This subject of referendal provisions became prominent by the middle of the century.

The location of county seats, the division of counties, etc., became the subject of referendal provisions in statutes at a comparatively early date.

The referendum having stood the test of experience, being found an effective check on acts of government adverse to the public interests, came to be more widely employed. Each year found new uses and new subjects for popular co-operation in local legislation and administration. It became extended to the general acts of the State legislature through the constitutions. All matters touching the relocation of seats of government, territorial division, the incurring of indebtedness, the pledging the faith of the government as security for local or private enterprise, the disposition of properties, franchises, etc., came to be regarded as proper subjects for

referendal elections as a means of adopting or of giving validity to such acts. In order that the extent of this practice may be realized we give a classified list of the subjects of referendal provisions by statutes, and in the footnote references a partial list of the States making such provisions. They appear as follows:

- I. Relative to acts of legislation and administration in county affairs. (1) The removal of county seats.<sup>10</sup> (2) The building of county buildings, such as court house, jail, etc.<sup>11</sup> (3) The repair of county buildings, the cost of which shall not exceed a specified amount.<sup>12</sup> (4) The relocation of county buildings.<sup>13</sup> (5) The organization of new counties.<sup>14</sup> (6) Changing boundaries of counties.<sup>15</sup> (7) Issuing bonds and borrowing money.<sup>16</sup> (8) Funding the county debt.<sup>17</sup> (9) Adopting a tax on dogs.<sup>18</sup> (10) Increasing the tax beyond the specified limit.<sup>19</sup> (11) Adopting a poor law.<sup>20</sup> (12) Purchasing real estate.<sup>21</sup> (13) Providing for a poor house.<sup>22</sup> (14) Providing for a children's home.<sup>23</sup> (15) Erecting monument for soldiers.<sup>24</sup> (16) Relief, by distribution of grain, seeds, etc.<sup>25</sup> (18) The building of normal schools.<sup>26</sup> (19) Providing for free common schools.<sup>27</sup> (20) Providing for administration of schools.<sup>28</sup> (21) Providing for county high schools.<sup>29</sup>

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<sup>10</sup> Cal., Del., Fla., Ind., Iowa, Kentucky, La., Me., Neb., Nev., Ohio, Penn., S. C., Wis.

<sup>11</sup> Fla., Ia., Mo., Ohio.

<sup>12</sup> Mich.

<sup>13</sup> Neb.

<sup>14</sup> Penn., Ind.

<sup>15</sup> Cal., Ind., Ky., La., Ohio.

<sup>16</sup> Kan., Me., Neb., N. C., S. C., Tenn., Wis.

<sup>17</sup> Fla., N. Y.

<sup>18</sup> W. Va.

<sup>19</sup> Kan., Ia.

<sup>20</sup> Penn.

<sup>21</sup> Ia.

<sup>22</sup> Ohio.

<sup>23</sup> Ia., Kans., Penn., S. C.

<sup>24</sup> Ia., N. Y., Ohio.

<sup>25</sup> Kan., Neb.

<sup>26</sup> Ill.

<sup>27</sup> Ind.

<sup>28</sup> Va.

<sup>29</sup> Ia., Kans.

- (22) The purchase of toll roads.<sup>30</sup> (23) The adoption of road law and the selling of bonds.<sup>31</sup> (24) Provisions for road board.<sup>32</sup> (25) Provisions for county board.<sup>33</sup> (26) The subscription to railway stock.<sup>34</sup> (27) The subscription to stock in coal mines, artesian wells, natural gas, etc.<sup>35</sup> (28) The adoption of liquor laws.<sup>36</sup> (29) Provisions for bounty for killing wild animals.<sup>37</sup> (30) Fencing for stock.<sup>38</sup> (31) Protection against prairie fires.<sup>39</sup>
- II. Relative to legislative and administrative acts in cities and towns. (1) As to incorporation.<sup>40</sup> (2) The surrender of charter.<sup>41</sup> (3) The consolidation of two or more cities or towns.<sup>42</sup> (4) The amendment of charter.<sup>43</sup> (5) The reorganization of the city government.<sup>44</sup> (6) The annexation of territory.<sup>45</sup> (7) The recession of territory.<sup>46</sup> (8) The classification or gradation of municipalities.<sup>47</sup> (9) The names of towns.<sup>48</sup> (10) The creation of new

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<sup>30</sup> Ind.

<sup>31</sup> Ind., Kans., Mich., Minn., Neb., N. J., Ohio., Ore., W. Va.

<sup>32</sup> N. J.

<sup>33</sup> N. J., Ia.

<sup>34</sup> Ind., Kans., Mo., Minn.

<sup>35</sup> Kans., Neb.

<sup>36</sup> Ark., Ga., Ky., La., Mich., Mo., N. C., S. C., Tex., Va.

<sup>37</sup> Neb.

<sup>38</sup> Ga., Ill., Ia., Kans., N. C., Penn., Tex., W. Va.

<sup>39</sup> Kans.

<sup>40</sup> Ala., Cal., Colo., Ga., Ill., Ia., Ind., Ky., Kans., Mich., Minn., N. J., N. Y., Penn., Tenn., Tex., W. Va., Wis.

<sup>41</sup> Ark, Colo., Fla., Ill., Mich., Minn., Neb., N. Y., Tex., Wis.

<sup>42</sup> Cal., Ill., Ind., Kans., Wis.

<sup>43</sup> Texas.

<sup>44</sup> Colo., Ind., N. J.

<sup>45</sup> Ala., Ark., Cal., Colo., Fla., Ga., Ind., Ia., Me., Minn., Mo., Neb., Ohio, Tenn., Tex., W. Va., Wis.

<sup>46</sup> Ark., Fla., Tenn., Tex.

<sup>47</sup> Ohio.

<sup>48</sup> Ala., Kans., Minn.

wards.<sup>49</sup> (11) Determining whether offices shall be elective or appointive.<sup>50</sup> (12) Determining whether the legislature shall be a popular assembly.<sup>51</sup> (13) Determining whether there shall be minority representation.<sup>52</sup> (14) Determining whether city shall subscribe to stock of railways, business corporations, etc.<sup>53</sup> (15) Free city libraries.<sup>54</sup> (16) Passing on appropriations other than those necessary for the regular departments of government.<sup>55</sup> (17) The enforcement of the collection of taxes.<sup>56</sup> (18) The levy of tax beyond certain limits.<sup>57</sup> (19) The sale of real estate belonging to the city.<sup>58</sup> (20) The acquiring of real estate.<sup>59</sup> (21) The borrowing of money.<sup>60</sup> (22) The issuing of bonds.<sup>61</sup> (23) Fixing the salaries of officers.<sup>62</sup> (24) Determining whether road tax may be worked out.<sup>63</sup> (25) Whether city may aid in building certain highways.<sup>64</sup> (26) Concerning the building of certain bridges.<sup>65</sup> (27) The closing of streets.<sup>66</sup> (28) The

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<sup>49</sup> Ind., N. J., Penn.

<sup>50</sup> Wis.

<sup>51</sup> Conn., N. H., Vt.

<sup>52</sup> Ill.

<sup>53</sup> Ala., Fla., Kans., Ky., La., Me., Md., Mass., Miss., Va., Wis.

<sup>54</sup> Colo., Ill., Mich., Mo., N. J., N. Y., R. I., Wis.

<sup>55</sup> Colo., Kans., Mich., Neb.

<sup>56</sup> N. J.

<sup>57</sup> Fla., Mich., Minn., N. J., R. I.

<sup>58</sup> Md.

<sup>59</sup> Md.

<sup>60</sup> Fla., Mich., N. Y., Wis.

<sup>61</sup> Colo., Fla., Ind., Kans., La., Md., Minn., Neb., N. J., N. Y., Ohio, W. Va.

<sup>62</sup> Colo.

<sup>63</sup> Ill.

<sup>64</sup> Colo., Ill.

<sup>65</sup> Wis., Ill., N. Y.

<sup>66</sup> Md.

adoption of liquor law.<sup>67</sup> (29) The fixing of the amount of the license.<sup>68</sup> (30) Pensions for policemen.<sup>69</sup> (31) Building of city hall.<sup>70</sup> (32) The organization of wards for school purposes.<sup>71</sup> (33) The selection of sites for schools.<sup>72</sup> (34) The levy of special tax for schools.<sup>73</sup> (35) Question of Board of Education.<sup>74</sup> (36) The establishment of high school.<sup>75</sup> (37) The length of school term.<sup>76</sup> (38) Water supply.<sup>77</sup> (39) As to parks—buying land, laying out, encroachments on, etc.<sup>78</sup> (40) The impounding of stock.<sup>79</sup> (41) The adoption of the merit system of civil service.<sup>80</sup> (42) The establishment of fire department.<sup>81</sup> (43) The increase of pay to police.<sup>82</sup> (44) Matters of drainage.<sup>83</sup> (45) Municipal lighting.<sup>84</sup> (46) River improvements.<sup>85</sup> (47) The building of monuments.<sup>86</sup>

III. As to the formation and administration of levee districts.<sup>87</sup>

IV. As to legislative and administrative acts in township. (1) Sale of school lands.<sup>88</sup> (2) The leasing of school lands.<sup>89</sup> (3) The division of school lands.<sup>90</sup>

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<sup>67</sup> Ark., Ga., Miss., Minn., Mass., Md., N. J., N. C., R. I., S. C., Tex., Wis.

<sup>68</sup> Wis.

<sup>69</sup> N. J.

<sup>70</sup> N. J.

<sup>71</sup> Ark., Mo., N. C.

<sup>72</sup> Ark.

<sup>73</sup> Colo., Ind., Kans., Md., Mass., Mich., N. J., N. Y., Ohio, Penn.

<sup>74</sup> Mass., Penn.

<sup>75</sup> Ark., Ill., Minn., Miss.

<sup>76</sup> N. J., Ill.

<sup>77</sup> N. J.

<sup>78</sup> N. J.

<sup>79</sup> Ill., Neb., N. J., N. Y.

<sup>80</sup> N. Y.

<sup>73</sup> Ark., N. J., Tenn.

<sup>74</sup> N. J.

<sup>75</sup> Wis.

<sup>76</sup> Ark.

<sup>85</sup> Ore.

<sup>86</sup> Wis.

<sup>87</sup> Ark.

<sup>88</sup> Ala., Ind., La.

<sup>89</sup> Ind.

<sup>90</sup> Ind.

(4) The levy of tax for school purposes.<sup>91</sup> (5) Liquor licenses.<sup>92</sup> (6) The issue of bonds.<sup>93</sup> (7) Subscription to stock.<sup>94</sup> (8) Libraries, parks and cemeteries.<sup>95</sup> (9) Holding town meetings.<sup>96</sup> (10) Change in name.<sup>97</sup> (11) Adoption of a herd law.<sup>98</sup> (12) Adoption of a dog law.<sup>99</sup> (13) Roads and bridges.<sup>1</sup> (14) Policemen.<sup>2</sup> (15) Sale of town property.<sup>3</sup>

V. As to administration in road districts.<sup>4</sup>

VI. As to administration in irrigation districts.<sup>5</sup>

VII. As to legislation and administration in school districts. (1) Organization of and general provisions for.<sup>6</sup> (2) Raising money in.<sup>7</sup> (3) Making loans.<sup>8</sup> (4) Consolidation of two or more.<sup>9</sup> (5) The selection of sites for building.<sup>10</sup> (6) The change of boundaries.<sup>11</sup> (7) The establishment of high school.<sup>12</sup> (8) The length of term of school.<sup>13</sup>

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<sup>91</sup> Ind., N. J., Ohio.

<sup>92</sup> Ind., N. C.

<sup>93</sup> Kansas, Mich., Ohio.

<sup>94</sup> Kans., Ohio, Penn.

<sup>95</sup> Kans., Mich., Ohio, Wis.

<sup>96</sup> Ill., Me., Mass., Mich., Md., Minn., Neb., N. J., R. I., Vt., Wis.

<sup>97</sup> Kansas.

<sup>98</sup> Kans., Mich., Mo., N. J., N. C., Wis.

<sup>99</sup> Wis.

<sup>1</sup> Mich., Minn., Mo., Penn., Wis.

<sup>2</sup> Neb.

<sup>3</sup> N. J., Ohio.

<sup>4</sup> Cal., Colo.

<sup>5</sup> Cal.

<sup>6</sup> Conn., Mich., Neb., N. J., Mo., Ohio., N. Y., R. I., Vt., Wis., Tex.

<sup>7</sup> Del., Ky., Minn., Mo., Nev. N. C., Ore., Tex., W. Va.

<sup>8</sup> Mo., Ohio.

<sup>9</sup> Del.

<sup>10</sup> Minn., N. Y., Ohio.

<sup>11</sup> Mo.

<sup>12</sup> Ohio.

<sup>13</sup> Tenn., W. Va.

## CHAPTER IX.

OPINIONS OF THE COURTS AS TO THE VALIDITY  
OF SUCH ACTS.

As shown in the previous chapter, popular co-operation in our government, in so far as it was not specifically provided for in the written constitution, had grown up and become a part of our unwritten constitution. Under this sanction, where the principle of representative government was employed, such acts had taken on the form of the referendum.

The first case that has come under our notice, in which the constitutionality of the referendum was questioned, arose in Massachusetts, coming before the Supreme Court of that State in 1826.<sup>1</sup> A law had been passed by the legislature fixing the jurisdiction of the courts of the city of Boston, which provided that a favorable vote of the people of that city should be had before it should go into effect. The law was attacked on the grounds that under a form of representative government guaranteed by the constitutions of the United States and of the State of Massachusetts the legislative power had been ceded by the people to a legislature consisting of a senate and a house of representatives; that, having established a constitutional agent, with power to exercise the legislative function, laws could be made only in the manner presented in the constitution and in no other; that the referring of an act of the legislature to the people for final passage was a delegation of the legislative power which was not in accord with the funda-

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<sup>1</sup> *Wales v. Belcher*, 3 Pick., 508.



mental principles of our government, and which was an attempted infraction of the constitution itself. But the Supreme Court, in passing judgment on this point, said:

This objection, for aught we see, stands unsupported by any authority or sound judgment. Why not the legislature make the existence of any act depend upon the happening of any future event? Constitutions themselves are so made; the representative body in convention or other forms of assembly fabricates the provisions, but they are nugatory unless at some future time they are accepted by the people. Statutes incorporating companies are made to derive their force from the previous or subsequent assent of the bodies incorporated. A tribunal peculiar to some section of the commonwealth may be thought by the legislature to be required for the public good and yet may not be acceptable to the community over which it is established. We see no impropriety, certainly no unconstitutionality, in giving the people an opportunity to accept or reject its provisions.

In 1837 the same question was raised in Virginia<sup>2</sup> relative to the constitutionality of the law authorizing the city of Richmond to subscribe to the capital stock of a canal company, but providing, first, for the submission of the law to the people of Richmond for assent. Again, the supreme court of the State, speaking through Justice Tucker, affirmed the principle of the referendum on the ground that—

The principle of good sense, not less than those of our institutions, inculcate the general propriety of leaving to individuals and to communities the right to judge for themselves what their interest demands, instead of fettering and controlling them under the false notion that we, the governors, know what is good for them better than they themselves.

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<sup>2</sup> *Goddin v. Crump*, 8 Leigh, 120.

The same principle was presented to the Maryland Court of Appeals in 1844 in the case of *Burgess vs. Pue*,<sup>3</sup> the law under consideration being one providing for the establishment of primary schools within such counties as by popular vote should accept its provisions. The controversy arose on the validity of a tax levied under this law, and the court decided that, in its opinion,

There was no validity in the constitutional question which was raised by the appellee's counsel in the course of his argument relative to the competency of the legislature to delegate the power of taxation to the taxable inhabitants for the purpose of raising a fund for the diffusion of knowledge and the support of primary schools. The object was a laudable one, and there is nothing in the constitution prohibitory of the delegation of the power of taxation in the mode adopted to effect the attainment of it. We may say that grants of similar powers to other bodies for political purposes have been coeval with the constitution itself, and that no serious doubts have ever been entertained of their validity.

Thus the principle of the exercise of the referendum under the unwritten constitution had stood without question for about half a century after the adoption of our written constitutions, and had been defended by the highest courts of those States where question had been raised until the famous decision of the Delaware Court of Errors and Appeals<sup>4</sup> in 1847, shook the legal foundations on which courts theretofore had rested their decisions and legislatures had based their action. The particular law involved was an act of the Delaware legislature passed February 19, 1847, "authorizing the people to decide by ballot whether licenses to retail intoxicating liquors should be permitted among them." Power was given to each county to vote "license" or "no license."

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<sup>3</sup> 2 Gill, 11.

<sup>4</sup> *Rice v. Foster*, 4 Harr, 479.

The reasonings of counsel followed by the courts were most subtle. The decision reads as follows:

The people of the State of Delaware have vested the legislative power in a General Assembly, consisting of a senate and house of representatives; the supreme executive power of the State in a governor, and the judicial power in several courts. The sovereign power, therefore, of this State resides in the legislative, executive and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so would be an infraction of the constitution and a dissolution of the government.

\* \* \* Although the people have the power, in conformity with its provisions, to alter the constitution, under no circumstances can they, so long as the constitution of the United States remains the paramount law of the land, establish a democracy or any other than a republican<sup>5</sup> form of government. It is equally clear that neither the legislative, executive or judicial departments, separately or all combined, can devolve on the people the exercise of any part of the sovereign power with which each is invested. The assumption of the power to do so would be usurpation. The department arrogating it would elevate itself above the constitution, overturn the foundation upon which its own authority rests, demolish the whole frame and texture of our representative form of government, and prostrate everything to the worst species of tyranny and despotism, the ever-varying will of an irresponsible multitude. \* \* \* If the legislature can refer one subject it can refer another to popular legislation. There is scarcely a case where much diversity of sentiment exists, and the people are excited and agitated by the acts and influence of demagogues, that will not be referred to a popular vote. The frequent and unnecessary recurrence of popular elections, always demoralizing in their effects, are among the worst evils that can befall a republican government,

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<sup>5</sup> It is evident that the court used "republican" as being synonymous with representative government as distinguished from a government by the people directly, as in the old colonial government by popular assembly.

and the legislation depending upon them must be as variable as the passions of the multitude. Each county will have a code of laws different from the other; murder may be punished with death in one, by imprisonment in another, and by fine in a third. Slavery may exist in one and be abolished in another. The law of to-day will be repealed or altered to-morrow, and everything be involved in chaos and confusion. The General Assembly will become a body merely to digest and prepare legislative propositions, and their journals a register of bills to be submitted to the people for their enactment.

Finally, the people themselves will be overwhelmed by the very evils and dangers against which the founders of our government so anxiously intended to protect them; all the barriers so carefully erected by the constitution around civil liberty to guard it against legislative encroachment and against the assaults of vindictive, arbitrary and excited majorities will be thrown down and a pure democracy, the worst of all evils, will hold its sway under the hollow and lifeless form of a republican government.

The same year the logic employed by the Delaware court was followed by Pennsylvania.<sup>6</sup>

It should be held in mind that the class of legislation under consideration is that which has to do with local subdivisions of the State—local option laws; that none of the cases referred to involve a discussion of the referendal principle as applied to measures to be voted on by people of the State at large. In the case of *Wales v. Belcher*,<sup>7</sup> three reasons were advanced in support of the constitutionality of the referendum—first, because “constitutions themselves were so made;” second, because “statutes incorporating companies are made to derive their force from the previous or subsequent assent of the bodies incorporated;” third, because “a tribunal

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<sup>6</sup> *Parker v. Commonwealth*, 6 Barr, 507.

<sup>7</sup> 3 Pick (Mass.), 508.

## OF DEMOCRACY.

the Commonwealth may be required by the public to be acceptable to the community—in other words, on analogy with institutions, on precedent or on expediency.

Chief-Justice, relying on the third principle, and charging on it, said:

These are not less than those of general propriety of leave-  
ing the right to judge  
the most demands instead of  
the false notions  
that is good for them  
and so.

Reason was added in sup-  
port of such measures, the court

the constitutional question  
was counsel in the course of  
competency of the legisla-  
tion to taxation to the taxable  
and that grants of similar  
real purposes have been  
and that no serious  
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reliance on the unwrit-  
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lawyers and jurists of that  
understanding of the true  
better grasp of the prin-  
ciple. The first reason set  
was wholly illogical. It  
was since the constitution

required the sanction of a popular vote, therefore ordinary legislation receiving the same sanction would be valid. The court seems to have lost sight of the fact that the one is the act of a political people setting up its government and prescribing the manner in which its political function shall be exercised, while the other is an attempt to exercise these functions according to the plan prescribed by the political people; that the one is an act of a constituent political body and the other of its governmental agent; and yet so potent was this reason for evil that we see it appearing long afterward. In *Caldwell v. Barrett* (73 Ga., 604) we find the following language: "If the constitution, the organic law of the State, has been made to depend upon the vote of the people, it is not easy to perceive why a local law, an act affecting a particular community, shall not be determined by the people of that locality." Other cases of like tenor might be cited.

The second reason urged was also very misleading. The fact that "statutes incorporating companies were made to derive their force from the previous or consequent consent of the bodies incorporated" has no direct analogy with the question in hand. The charter grants are, on the one hand, in the nature of contracts in which the State and the company are the parties to make them valid. On the other hand, in so far as they provide for the exercise of sovereignty, they are more analogous to constitutions than ordinary laws and the consent of the corporation is necessary to put the charters or constitutions in operation and make them binding; but these charters having been agreed upon or accepted, the legislature may then pass laws not in conflict with charter rights governing these companies and the incorporators are not consulted at all in such matters.

The third reason set forth in this case and the one urged in *Goddin v. Crump* was as vicious as the other.

two. The danger of asserting "the general propriety of leaving to individuals and to companies the right to judge for themselves what their interests demand instead of fettering and controlling them under the false notion that we, the governors, know what is good for them better than they themselves," is self-evident. The only sound principle announced in all three cases was that quoted above in *Burgess v. Pue*, and in this the principle was only faintly suggested. It is therefore, matter of little surprise that, with such reasoning as this, other courts should see approaching danger to our institutions in the referendum. They saw in our government a representative republic; they saw that the people of the State had vested the legislative power "in a general assembly consisting of a senate and house of representatives; the supreme executive power of the State in a governor, and the judicial power in the several courts." The sovereign power, therefore, it was argued, "resides with the legislative, executive and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it. To do so would be an infraction of the constitution and a dissolution of the government." And they argued from these premises that, "although the people have the power, in conformity with its provisions, to alter the constitution, under no circumstances can they, so long as the constitution of the United States remains the paramount law of the land, establish a democracy or any other than a republican form of government."

What was wrong? At what point does the logic of the court in *Foster v. Rice* break down? Does not the whole fault lie in a misconception of the true nature of our government and a lack of proper interpretation of the intent of the federal constitution in guaranteeing to each State a republican form of government? This clause of the federal constitution, so far as is known to

the author, has not been construed by the United States court except in the case of *Texas v. White*, 7 Wall., 721, wherein the chief justice said:

A State, in the ordinary sense of the constitution, is a political community of free citizens, occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed.

\* \* \* There are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in a clause which requires that the United States shall guarantee to every State in the Union a republican form of government.

This construction is certainly very unsatisfactory and does not suffice for a definition of the concept "republican form of government" as used in the constitution. It would seem, however, that at the time of the formation of the constitution of the United States the leading thinkers of the day had the concept defined in their own minds, and that they understood a "republican form of government" as presented therein, to mean a representative republic, in its federal and State organization, but that the local subdivisions of the State did not enter into this concept; that the attempt to extend the inhibitions of the constitutions and the logic of representative government into the township and other local organizations was born of a desire to defeat a local-option liquor law. The error which the court made in *Rice v. Foster* and *Burgess v. Pue* was in ignoring the unwritten constitution and seeking by implication to carry the logic of representative government down to the smallest political subdivision. It has been the fault of many courts to confine their vision of our government to the exact provisions of the written constitution and to exclude all



else; and those who have found it to their interest to oppose the referendum in the United States have availed themselves of this judicial tendency with much satisfaction to themselves. One can scarcely conceive of a more ludicrous position for a court to place itself in than appears in *Ex rel. Wall*, 48 Cal., 279, in which the court declares a local-option law unconstitutional and in support thereof urges that "our government is a representative republic, not a simple democracy. Whenever it shall be transformed into the latter, as we are taught by all the examples of history, the tyranny of a changeable majority will soon drive all honest men to seek refuge beneath the despotism of a single ruler."

The inference here indulged in—that because, according to ancient custom and the unwritten constitution, the legislature has made the acceptance of a law by a certain local political unit dependent upon a popular vote of that local political unit, therefore the safeguards of the written constitution are imperiled—is on a par with the vagaries employed by the court in *Rice v. Foster* and *Parker v. Commonwealth*. They overlooked the fact that the unwritten constitution is subordinate to, and to that extent modified by, both the written constitutions and the acts of the legislature, and for that reason any act performed under the unwritten constitution could not impair these safeguards.

But the confusion of juridical thought and the subtleness of the position taken in these two cases of 1847 was sufficient to throw the court and public into a turmoil for several decades following. It will be of interest for us to consider the evolution of thought in this regard. In 1848, in the *People ex rel. v. Reynolds*, 5 Gelm, 1, the Supreme Court of Illinois, passing on the validity of a law which provided for the submission of the question of the division of a county to a vote of the **people of that county**, the court gave emphasis to the

principle that "a law may depend upon a future event or contingency for its taking effect" and refused to entertain the objection made that such a submission to the people was a delegation of legislative power. In this relation the court said:

Had this authority been given to a court, instead of the voters, we are compelled to think that no complaint of its constitutionality would have been entertained; and yet there would have been as much delegation of power in one case as in the other. To prove this needs no argument. If, by leaving this question to the people, the republican form of government is to be overturned and its principles subverted by a miniature democracy, may not the same awful calamities be apprehended from a miniature monarchy?

The first principle here announced was followed in 1849 by the Supreme Court of Kentucky—*Talbot v. Dent*, 9 B. Mon., 526. The fiction so often employed in other cases was set forth as follows:

It is no objection to the constitutional validity of such statutes that they depend for their final effects upon the discretionary acts of individuals and others. The legislative power is not exercised in doing the act, but in authorizing it and in prescribing its effects and consequences. \* \* \* We do not perceive that there is any greater abandonment of the legislative will and discretion necessarily to be implied in referring this question as to the execution of the authority and final imposition of the tax to a majority of those who are to bear it than in referring it to the county court or to the trustees or council of a town or city.

And a few months after the Illinois Supreme Court rendered its decision in *People ex rel. v. Reynolds*, the Supreme Court of Pennsylvania adopted its principle practically reversing the precedent established in the case before cited.<sup>10</sup>

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<sup>10</sup> *Supra*, p. 200.

The premises postulated in these early decisions supporting the constitutionality of the referendum in local option laws, briefly stated, are: First, that, "although the legislature cannot delegate its power to make laws, it can make a law to delegate the power to determine some fact or state a thing upon which the law makes or intends to make its action to depend;" and, second, that, "local option laws are not delegations, in any sense, of legislative power. \* \* \* They are made operative or not in particular localities, upon certain circumstances, which are referred to the people for determination, but when set in operation they derive their origin from the original legislative life infused into them as general laws of the land." Therefore, they conclude, local option laws are constitutional.

The force with which this logic has appealed to courts may be seen in the frequency with which it was followed. We find that more than sixty decisions supporting the referendum were based wholly or in part on this line of reasoning.

But this reasoning was faulty, in that the major premise was not above question. Is it true that the legislature may delegate the power to make laws? The constitutional writers of to-day affirm that the legislature may not delegate those powers which have been conferred upon it by the people in this written constitution as there is an exact prescription,<sup>11</sup> but in matters of local gov-

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<sup>11</sup> "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by the constitutional agency alone, the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute this judgment, wisdom, and patriotism, of any other body for those to which alone the people have seen fit to confide this sovereign trust. (Cooley, 2nd ed., p. 116.)

ernment, relative to which no constitutional provision has been made, the common law—the unwritten constitution—sanctions such delegation of power. Mr. Cooley, who so forcefully states the principle that the legislature cannot delegate the exercise of power conferred upon it by the people in their written constitutions, with equal force makes this distinction relative to local government. His language in this relation is as follows:

We have already seen that the legislature cannot delegate its powers to make laws,<sup>12</sup> but fundamental as this maxim is, it is so qualified by the customs of our race and by other maxims<sup>13</sup> which regard local government that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged. The legislature in these is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to properly belong to the State and when it interferes, as sometimes it must, to restrain and control local action, there must be reasons of State policy or dangers of local abuse to warrant the interposition.

The people of the municipalities, however, do not define for themselves their own rights, privileges and powers, nor is there any common law which draws any definite line of distinction between the powers which may be exercised by the State and those which must be left to the local governments. The municipalities must look to the State for such charters of government as the legislature shall see fit to provide; and they have a right to expect that those charters will be granted with the recognition of the general principles with which we are familiar. The charter or the general law under which

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<sup>12</sup> From what has been said before it is evident that he has reference to the power conferred by the written constitution.

<sup>13</sup> No better definition could be found for the unwritten constitution.

they exercise their powers, is the constitution, in which they must show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations and restrictions as are annexed to the grant."<sup>14</sup>

This statement of the principles underlying the powers of the legislature relative to the political subdivisions of the State can be founded on no other basis than the unwritten constitution. Under this unwritten constitution the legislature "may exercise such powers of government coming within a proper designation of legislative power, as are not expressly or impliedly prohibited," by the written constitution.

But the second premise also may be questioned as to its soundness. In the first place, the statement that "local option laws are not delegations in any sense, of legislative power," would not be granted; it would not be conceded that, "when set in operation they derive their origin from the original legislative life infused into them as general laws of the land." The legislature having the power to prescribe in what manner the local bodies shall act, has laid down a rule for their action in making provision for certain local legislation. Instead of leaving to each separate city of the State the right to prescribe by ordinance for certain matters, the legislature provides that in case any of these cities choose to act in these matters, it shall act in a certain manner. We will take for example a liquor law; the legislature puts on

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<sup>14</sup> Both of these propositions are supported by a long list of cases.

the statute book a liquor law to apply to all cities that by popular ballot choose to be governed by it. This is exactly the same process as the passage by the legislature of a measure to apply to the whole State in case the electors of the State shall by ballot choose to be governed by it; and yet, in the latter case, the courts have generally declared such an act unconstitutional on the ground that it was a delegation of the express powers of legislation conferred on the legislature by the written constitution, and it is only when the constitution itself provides for such a course of legislation that they are held to be valid. In the case of a State law referred to the people by constitutional provision, it could not be said that the law derived its power "from the original legislative life infused into it," but that its life was due to the conjoint action of both legislature and people. It would not be more logical to affirm the same relative to a law which had, under the unwritten constitutional power, required the sanction of a popular ballot. With this melange of theory and chaos of ideas, it is little wonder that the referendum was constantly brought into question and that a few decisions were recorded adverse to this form of legislation. One is surprised that the laws involving this principle were so often supported, their support resting on such an illogical and unsound basis. The true theory of legislation of this kind was first essayed by the Supreme Court of Vermont in 1849. In *Bancroft v. Dumas* (21 Vermont, 456) the court said:

It is objected to the validity of this law that its vitality is made to depend upon the will of the people, expressed at the ballot box, and hence it is urged that it is not a law enacted by the legislature. \* \* \* The granting of licenses is made to depend upon the expressed will of the people. Can this feature of the statute invalidate the law? Is a law to be adjudged invalid because it is conformable to the public will? It is in accordance with

the theory of our government that all our laws should be in conformity to the wishes of the people. Surely, then, it can be no objection to a law that it is approved by the people. We believe that it has never been doubted that it is competent for the legislature to constitute some tribunal or body of men to designate proper persons for inn-keepers and retailers of ardent spirits. Such was the character of all our early laws relating to licensing of inn-keepers by authorizing the selectmen and civil authority to approbate suitable persons, and restricting the county courts to the licensing of such as should be approbated; and we are not aware that the constitutionality of these laws was ever questioned. And at one period, during the continuance of the license law of 1838, the power of determining whether licenses should be granted was vested in the selectmen and civil authority of the several towns. If the legislature could legally and constitutionally submit the question whether licenses should be granted to the determination of a portion of the people, could they not with equal, if not with greater, propriety submit it to the decision of the whole people?

This placed the fundamental power of the legislature to provide for the submission of laws of local importance to a vote of the people on ancient custom and accepted maxims—in other words, on the unwritten constitution. As shown before,<sup>15</sup> the Supreme Court of Pennsylvania in 1848, in *Commonwealth v. Judges*, had suggested the same principle. They did not seek to put legislation of this kind on a par with the written constitution, nor rely on the legal quibble that the referendal act and the popular consent were not legislative acts, nor deny that it was a delegation of power; but many of the cases, following the theory employed in *Bancroft v. Dumas*, declared it to be a delegation of legislative power, and asserted the doctrine that “The legislature may authorize local bodies to legislate in local matters.”

The subjects of legislation that have come under re-

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<sup>15</sup> *Supra*, p. 195.

view in passing on the constitutionality of local option laws have been many, such as the incurring of debt, the purchase of bonds and the issuance of others in their stead, stock subscription to local enterprise, annexation of territory to counties, division of counties and the formation of new ones, school tax, the removal of county seats, the incorporation of cities and towns, the location of parks, the running of stock at large, the regulation of elections, night herd law, subsidies to railways, the establishment of private schools, determining the jurisdiction of courts, building levees, supporting bowling alleys, providing for roads, borrowing money, the granting of licenses, etc. In searching for the cases involving the referendal principle in local legislation, the author has succeeded in finding 107, and, of these, all but thirteen have on one ground or another sustained their validity. Arranging them by decades, they present the following comparison:

	1820- 1829	1830- 1839	1840- 1849	1850- 1859
Declared unconstitutional . . . . .	0	0	2	6
Declared constitutional . . . . .	1	1	7	22
	1860- 1869	1870- 1879	1880- 1889	1890- 1897
Declared unconstitutional . . . . .	1	3	0	0
Declared constitutional . . . . .	14	19	20	10

It may be said that the principle from a judicial standpoint is settled, yet the liquor and corporate interests are such that until this attitude has been maintained by the courts for years with unanimity, in their efforts to evade the provisions of law, we may expect that the courts will be appealed to to pass judgment thereon.

We have confined the discussion, so far, to local option laws, i. e., laws affecting the various local subdivisions of the State that are referred to the people for them to exercise their option in accepting or rejecting the legislative measure in question. There is another



class of legislation involving the referendum which has also come before the courts. I refer to acts intended to be general, affecting the whole State, and which have been referred by the legislature to a vote of the electors of the State.

One of the first and most noted cases of this class is that of *Barto v. Himrod*, 4 Seld. (N. Y.), 483, the final decision in which was rendered in 1853 by the New York Court of Appeals. In the year 1849 the legislature of that State had passed an act known as "The Free School Law." In this enactment the legislature provided that it should become operative from and after January 1, 1850, if a majority of all the votes cast at an election to be held throughout the State should be in favor of it, but void in case it did not receive such a majority. Several cases arose in different parts of the State, and in *Barto v. Himrod* the Court of Appeals decided the law unconstitutional. Chief Justice Ruggles, delivering the opinion, said:

It is not denied that a valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. But such a statute, when it comes from the hand of the legislature must be law in presenti to take effect in futuro. \* \* \* The event or change of circumstances on which a law may be made to take effect must be such as in the judgment of the legislature affects the question of the expediency of the law; an event on which the expediency of the law in the judgment of the lawmakers depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. \* \* \* But in the present case no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the free school law, abstractly considered, did not depend on a vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterwards. The event on which the act was made to take effect was nothing else than the vote

of the people on the identical question which the constitution makes it the duty of the legislature itself to decide. \* \* \* The government of this State is democratic, but it is a representative democracy, and in passing general laws the people act only through their representatives in the legislature.<sup>16</sup>

Without doubt the position taken in such cases is perfectly sound, for the people have specifically provided, in their written constitutions, the manner in which general State laws shall be passed, and, according to our theory of government, legislation of this kind can take place in no other way. It would certainly be revolutionary for the legislature to attempt to pass general laws, in any other manner than that provided by the written constitution, and it would be equally revolutionary for the judiciary and the executive to enforce any legislative action of this kind. Here the unwritten constitution, which allowed the legislature to modify it at will, was abrogated by act of the people and a written constitution, defining the powers and duties of all branches of government, erected in its stead. The same may be said of any attempt on the part of the people to legislate for themselves directly till they had made provision for such acts by a constitutional amendment. All of the reasons applied by the several courts to local option laws, in declaring them unconstitutional because opposed to the principles of representative government and our fundamental law, would be applicable here. The cases of this kind, however, have been so few as to warrant little discussion except as a matter of discovering, in cases where no constitutional provision has been made for it, the theory of the referendum under our governmental plan.

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<sup>16</sup> See, also, *Mayor and counsel of city of Brunswick v. Finney*, 54 Ga., 317 (1875); *State v. Hayes*, 61 N. Y., 264 (1881); *Bank of Chenango v. Brown*, 26 New York, 467 (1863); *Gould v. Town of Sterling*, 23 New York, 456 (1861); *State, ex rel., v. Wilcox*, 45 Mo., 458.

## CHAPTER X.

POPULAR CO-OPERATION IN LEGISLATION AND  
ADMINISTRATION (2) UNDER WRITTEN  
CONSTITUTIONS.

The development of constitutional provisions for popular co-operation in acts of government seems to be somewhat intimately associated with the judicial contests growing out of their use. Nothing more forcibly illustrates the desire of our society for a settled and well-established order. The referendum had been resorted to by the people as a means of protecting themselves against the predatory activities of the public agents to whom were entrusted the exercise of sovereign power. This means of protection had been questioned and in some instances denied. The interests of society demanded that it be protected both from oppressive acts of government and from the blight of uncertainty. It being advantageous to the public welfare that the referendum be retained as a part of our polity, the courts having denied this right or having caused doubt to exist relative to its constitutionality, the people sought the first opportunity to incorporate the provisions desired in their constitutions. The courts having denied to the legislature and to the people those rights which had been exercised by them under the unwritten constitution, the people asserted these rights in that constituent capacity which the courts could not deny; they incorporated them in their written constitutions.

This may seem an unwarranted inference; yet the fact that no provision was made in the written constitutions for the use of the referendum in local option laws till

1834, nearly ten years after question as to its validity had been raised—in Massachusetts;<sup>1</sup> that the next provision of this kind appeared in 1848—in Illinois, immediately after question was raised in that State as to the constitutionality of a local option law, and providing for the very subject of litigation; that in the same year like provision was made in Wisconsin, a neighboring State; that no other constitutional provision for the referendum, in local matters, was made till 1850, prior to which time the validity of such laws had been questioned in nine different States; these facts, together with the further fact that the provisions for referendum in the constitutions increase very much in the same proportion as the controversies arising out of referendal uses in matters of local legislation, argue very strongly for the correctness of this view.

Two classes of provisions for referendum appear in the written constitutions: First, those providing for the referendum in general acts of government, i. e., acts affecting the State at large; and, second, those providing for referendum in acts of local government, i. e., measures affecting political subdivisions of the State. We will consider them in the order stated.

### I.

The first class of provisions were not, in all probability, seriously affected by the decisions of courts, for, as stated before,<sup>2</sup> it was quite generally conceded, that the adoption of written constitutions, providing a specific manner in which general laws should be passed and the agents for their enactment, abrogated the unwritten constitutional powers of the legislature to this extent, and required that general laws be passed in the manner and by the agents prescribed. Therefore, the growth of the

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<sup>1</sup> See *supra*, p. 191.

<sup>2</sup> *Supra*, p. 198.

class of provisions may be attributed to the necessity arising out of political and social conditions.

The first constitutional provision for referendum, of a general character, appears in the Georgia constitution of 1798 (Art. I, Sec. 23). The subject-matter is that of State boundaries. The provision is as follows:

And this convention doth further declare and assert that all the territory within the present temporary line, and within the limits aforesaid, is now, of right, the property of the free citizens of the State and held by them in sovereignty, inalienable but by their consent.

This is followed by certain provisos. Another provision on the same subject appears in the constitution of West Virginia—constitution of 1872, Art. VI, Sec. 11—which recites that “additional territory may be admitted into and may become a part of this State, with the consent of the legislature and a majority of the qualified voters of the State voting on the question,” etc., etc.

In New York, at the time of the adoption of the constitution of 1846, the question of extending the right of suffrage to negroes was referred to the people,<sup>3</sup> and like provision was made in Michigan constitution of 1850.<sup>4</sup> Referendal provisions relative to suffrage also appear in the constitutions of Wisconsin<sup>5</sup> (1848), Kansas<sup>6</sup> (1858), Colorado<sup>7</sup> (1876), South Dakota<sup>8</sup> (1889), Washington<sup>9</sup> (1889), and North Dakota<sup>10</sup> (1895).

But questions of boundary, territorial extent of a State and suffrage are constitutional in their nature rather

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<sup>3</sup> Journal of Convention, Vol. IV, p. 463.

<sup>4</sup> Mich., Cons. 1850, Sched., 30.

<sup>5</sup> Wis. Cons. 1848, III, 1.

<sup>6</sup> Kans. Con., 1858, Sched., 12.

<sup>7</sup> Colo. Cons., 1776, VII, 2.

<sup>8</sup> S. Dak. Cons., 1889, VII, 2.

<sup>9</sup> Wash. Cons., 1889, Sched., 8.

<sup>10</sup> N. Dak. Cons., 1895.

than subjects of ordinary legislation. The establishment of a State involves two things, viz.: An organized political people, and a clearly defined territory over which their sovereignty extends. The question of suffrage pertains to the former—a definition of the political people. The question of boundaries pertains to the latter, the definition of territorial jurisdiction. Both are essential. Political organization and territorial limits being essential parts of the constitution, all questions regarding suffrage, change in boundaries, sessions and annexations should have the same sanctions, theoretically, as other portions of the constitution. Eliminating these, therefore, we find no provisions for the referendum in ordinary legislation prior to 1842, at which time the people of Rhode Island incorporated in their constitution the following:

The General Assembly shall have no power hereafter, without the express consent of the people, to incur State debts to an amount exceeding fifty thousand dollars, except in time of war, or in case of insurrection or invasion; nor shall they in any case without such consent pledge the faith of the State for the payment of the obligations of others.

In 1843<sup>11</sup> Michigan amended her constitution requiring:

Every law authorizing the borrowing of money or the issuing of State stocks, whereby a debt shall be created on the credit of the State, shall specify the object for which the money shall be appropriated; and that every such law shall embrace no more than one such object, which shall be simply and specifically stated, and that no such law shall take effect until it shall be submitted to the people at the next general election and be approved by a majority of the votes cast for and against it at such election, etc.

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<sup>11</sup> Mich. Am., 1843, to Cons., 1835.

New Jersey, in her constitution of 1844,<sup>12</sup> made provision that:

The legislature shall not, in any manner, create any debt or debts, liability or liabilities of the State, which shall, singly or in the aggregate, with any previous debts or liabilities, at any time exceed one hundred thousand dollars, except for purposes of war or to repel invasion or to suppress insurrection, unless the same shall be authorized by a law for some single object or work to be distinctly specified therein, which law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within thirty-five years from the time of the contracting thereof, and shall be irrepealable until such debt or liability and the interest thereon are fully paid and discharged, and no such law shall take effect until it shall at a general election have been submitted to the people and have received the sanction of a majority of all the votes cast for and against it at such election, etc.

These provisions for the employment of the referendum were clearly the outgrowth of the financial excesses and abuses of previous legislatures. They were the forerunners of the many provisions in later constitutions for a popular vote in matters of State debts and liabilities. New York<sup>13</sup> and Iowa,<sup>14</sup> in 1846; Illinois,<sup>15</sup> in 1848; California,<sup>16</sup> in 1849; Kentucky,<sup>17</sup> in 1850; Kansas,<sup>18</sup> in 1859; Nebraska,<sup>19</sup> in 1866; North Carolina<sup>20</sup> and Ar-

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<sup>12</sup> New Jersey Cons., 1844, IV, 6.

<sup>13</sup> N. Y. Cons., 1846, VII, 1, 12.

<sup>14</sup> Ia. Cons., 1846, VII, 5; Cons. 1857, VII, 5.

<sup>15</sup> Ill. Cons., 1848, III, 37.

<sup>16</sup> Cal. Cons., 1849, VIII.

<sup>17</sup> Ky. Cons., 1850, II, 36, also Cons. 1891, 51-2

<sup>18</sup> Kans. Cons., 1859, X, 16.

<sup>19</sup> Neb. Cons., 1866, II, 32.

<sup>20</sup> N. C. Cons., 1868, V, 5, also Cons. 1876, V, 4.

kansas,<sup>21</sup> in 1868; Missouri,<sup>22</sup> in 1875; Colorado,<sup>23</sup> in 1876; Louisiana,<sup>24</sup> in 1879; Idaho,<sup>25</sup> Montana,<sup>26</sup> Washington,<sup>27</sup> Wyoming,<sup>28</sup> in 1889, and South Carolina,<sup>29</sup> in 1895, made similar provisions for a compulsory referendum in measures involving the use of State credit.

The next class of general legislation in which the referendal device was employed was that providing for the location of the seats of State government. The first State to adopt its use was Texas—Cons. 1845, Art. III, Sec. 35. Texas was a new State, and was also a very large State. Many of its inhabitants were from those sections of the country where speculation in public lands had been rife and in which the location of public buildings, State and county seats had played a leading part. Connivance of officials with certain speculators and spoilsmen led the political people to withdraw from the officer his power and to reserve to themselves the right of determining the location of State institutions. The section of the constitution above referred to reads as follows:

In order to settle permanently the seat of government, an election shall be holden throughout the State at the usual places of holding elections, on the first Monday in March, one thousand and eight hundred fifty, which shall be conducted according to law; at which time the people shall vote for such place as they may see proper for the seat of government. The returns of said election to be transmitted to the governor by the first Monday in June; if either place voted for shall have a majority of the whole number of votes cast, then the same shall be the permanent seat of government until the year

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<sup>21</sup> Ark. Cons., 1868, 10, 6, also Cons. 1874.

<sup>22</sup> Missouri Cons., 1875, IV, 44.

<sup>23</sup> Colo. Cons., 1876, XI, 5.

<sup>27</sup> Wash. Cons., 1889, VIII.

<sup>24</sup> La. Cons., 1879.

<sup>28</sup> Wyo. Cons., 1889, XVI, 12.

<sup>25</sup> Idaho Cons., 1889, VIII, 1.

<sup>29</sup> S. C. Cons., 1895, 10.

<sup>26</sup> Mont. Cons., 1889, XIII, 2.



one thousand eight hundred and seventy, unless the State shall sooner be divided. But in case neither place voted for shall have a majority out of the whole number of votes given in, then the governor shall issue his proclamation for an election to be holden in the same manner, on the first Monday in October, one thousand eight hundred and fifty, between the two places having the highest number of votes at the first election.<sup>30</sup>

Oregon, in 1857, provided that:

The Legislative Assembly shall not have power to establish a permanent seat of government for this State; but at the first regular session after the adoption of this constitution the Legislative Assembly shall provide by law for the submission to the electors of this State, at the next general election thereafter, the matter of the selection of a place for a permanent seat of government; and no place shall ever be the seat of government under such law which shall not receive a majority of all the votes cast in the matter of such election.

The other States following the example of Texas were: Minnesota,<sup>31</sup> in 1857; Kansas,<sup>32</sup> in 1858 and 1859;<sup>33</sup> Florida,<sup>34</sup> in 1868; Colorado,<sup>35</sup> in 1876; Georgia,<sup>36</sup> in 1877; Oregon,<sup>37</sup> in 1880; Idaho,<sup>38</sup> Montana,<sup>39</sup> South Dakota<sup>40</sup> and Washington,<sup>41</sup> in 1889; Mississippi,<sup>42</sup> in 1890.

Banks and banking have been among the most frequent subjects of legislation in which the referendum has been employed. In this, Iowa took the initiative. Section 15 of Article III of the constitution adopted in the year 1846 has the following:

<sup>30</sup> Similar provisions are found in the Texas constitutions of 1866 (III, 33) and 1868 (III, 37).

<sup>31</sup> Minn. Cons., 1857, XV, 1. <sup>37</sup> Ore. Cons., 1880, XX, 1.

<sup>32</sup> Kans. Cons., 1858, sched., II. <sup>38</sup> Idaho Cons., 1889, X, 2.

<sup>33</sup> Kans. Cons., 1859, XV, 8.

<sup>39</sup> Mont. Cons., 1889, X, 2.

<sup>34</sup> Fla. Cons., 1868, III.

<sup>40</sup> S. Dak. Cons., 1889, XX, 1.

<sup>35</sup> Colo. Cons., 1876, VIII, 2.

<sup>41</sup> Wash. Cons., 1889.

<sup>36</sup> Ga. Cons., 1877.

<sup>42</sup> Miss. Cons., 1890.

No act of the General Assembly authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect, or in any manner be in force, until the same shall have been submitted separately to the people, at a general or special election as provided by law, to be held not less than three months after the passage of the act, and shall have been apprised by a majority of all the electors voting for and against it at such election.<sup>43</sup>

In 1848 Illinois<sup>44</sup> followed the example of Iowa in almost exact terms.<sup>45</sup> The constitution of Wisconsin, adopted the same year, has the following:

The legislature may submit to the voters at any general election the question of "bank or no bank;" and if at any such election a number of votes equal to a majority of all the votes cast at such election on that subject shall be in favor of banks, then the legislature shall have power to grant bank charters, or to pass a general banking law; with such restrictions and under such regulations as they may deem expedient and proper for the security of the bill holders: Provided, that no such grant or law shall have any force or effect until the same shall have been submitted to a vote of the electors of the State at some general election, and been approved by a majority of the votes cast on that subject at such election.

In Michigan the provision took a still more general form. Section 2 of Article XV of the constitution of 1850 provided:

No banking law or law for banking purposes, or amendments thereto, shall have effect until the same

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<sup>43</sup> The Cons. of Iowa, 1857, VIII, 5, made the same provision except that it required the general or special election to be held "not more than three months hence."

<sup>44</sup> Ill. Cons., 1848, X, 5.

<sup>45</sup> The language is identical except that "nor amendments thereto" is dropped after "banking powers." The Ill. Cons., 1870 (XI, 5) adds after "banking powers" "whether of issue, deposit, or discount, nor amendments thereto."

shall, after its passage, be submitted to a vote of the electors of the State, at a general election, and be approved by a majority of the votes cast thereon at such election.<sup>46</sup>

The provision of the Ohio constitution of 1851 (Art. VIII, Sec. 5) followed that of Michigan. The Kansas constitution of 1857 has the following clause.<sup>47</sup>

The legislature may incorporate one bank of discount and issue, with not more than two branches: Provided, That the act incorporating the said bank and branches thereof shall not take effect till it shall be submitted to the people on the general election next succeeding the passage of the same, and shall have been approved by a majority of the electors voting at such election.

The provision of the Kansas constitution of 1859<sup>48</sup> followed that just quoted. The provisions of the constitution of Kansas, 1858,<sup>49</sup> followed that of Michigan, and those of the Missouri constitution, 1875,<sup>50</sup> followed that of Illinois. The Federal banking acts, doing away with the "issue" function of State banks brought this class of constitutional provisions to a close.

The subject of the sale of school lands was the next to receive sufficient attention to enter into constitutional provisions for referendum. The Kansas constitution of 1859<sup>51</sup> declares: "The school lands shall not be sold unless such sale be authorized by the people at a general election." This, however, is the only constitution in which such provision appears.

Legislation relating to State aid to railways was first brought within the constitutional provisions for referendum in 1860 by Minnesota, as an amendment to the

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<sup>46</sup> This provision was amended 1862.

<sup>47</sup> Kan. Cons., 1857, XII, 5.      <sup>49</sup> Kans. Cons., 1858, XVII, 9.

<sup>48</sup> Kans. Cons., 1859, XIII, 8.      <sup>50</sup> Mo. Cons., 1875, XII, 26.

<sup>51</sup> Kans. Cons., 1859, VI, 5.

constitution of 1857. The amendment is to the effect that:

No law levying a tax, or making other provision for the payment of interest or principal of the bonds denominated "Minnesota State Railway bonds" shall take effect or be in force until such law shall have been submitted to a vote of the people of the State and adopted by a majority of the electors of the State voting in the same.

This amendment grew out of the fact that in 1858 a previous amendment had been adopted authorizing the issue of \$5,000,000 of bonds to aid in the construction of certain railroads. The companies having received the desired aid, failed to meet the conditions imposed on them, leaving the people to pay a large indebtedness under conditions very different from those which were made the basis of the grant. The amendment of 1860 was passed for the purpose of preventing the legislature from settling these claims in a manner unfavorable to the people. After the adoption of the amendment several laws were passed by the legislature providing for an adjustment of the claims,<sup>52</sup> some of which were unsatisfactory to the people and others to the bondholders. Finally, the courts having declared the amendment unconstitutional on the ground that it contravened the constitution of the United States,<sup>53</sup> the affair was adjusted by the legislature without the consent of the people.

In Missouri, in 1865, at the time of submitting the constitution, the question of an ordinance which provided for the payment of certain railway bonds was re-

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<sup>52</sup> The first attempt was in 1866, the second in 1867, the third in 1870 and the fourth in 1871.

<sup>53</sup> The court took the ground that the amendment was an impairment of the obligation of contracts. See *State v. Young*, 29 Minn., 474.

ferred to the people by act of the constitutional convention.<sup>54</sup>

In Illinois,<sup>55</sup> West Virginia,<sup>56</sup> Nebraska,<sup>57</sup> Alabama,<sup>58</sup> Colorado<sup>59</sup> and Texas<sup>60</sup> provisions were made that the legislatures of these States should not grant any right to construct street railways in cities, towns or villages or upon public highways without the consent of the electors or local authorities.<sup>61</sup>

As to the subject of taxation, the referendum was first employed under the Illinois constitution of 1848. By Article III, Section 37, it was provided that upon the submission of the law for the increase of the State indebtedness over \$50,000 that "provision shall be made at the time for the payment of the interest annually as it shall accrue, by a tax levied for the purpose, or from other sources of revenue; which law providing for the payment of such interest by such tax shall be irrepealable until such debt be paid; and provided, further: That the law levying the tax shall be submitted to the people with the law authorizing debt." This was the first constitutional provision of the kind adopted in the States.

Colorado—constitution 1876, X, 11—made the following provision:

The rate of taxation on property for the State purposes shall never exceed six mills \* \* \* and whenever the taxable property within the State shall amount to \$100,000,000 the rate shall not exceed four mills; \* \* \* and whenever the taxable property within the

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<sup>54</sup> Poore, Charters and Constitutions, II, p. 1162, Sec. 7.

<sup>55</sup> Ill. Cons., 1870, XI, 4.

<sup>56</sup> West Va. Cons., 1872, XI, 5.

<sup>57</sup> Neb. Cons., 1875, XII, 2.

<sup>58</sup> Ala. Cons., 1875, XIV, 24.

<sup>59</sup> Colo. Cons., 1876, XV, 11.

<sup>60</sup> Texas Cons., 1876, X, 7.

<sup>61</sup> Provisions for reference of law to the authority of the locality is not strictly within the meaning of the referendum.

State shall amount to \$300,000,000 the rate shall never thereafter exceed two mills, \* \* \* unless the proposition to increase such rate, \* \* \* be first submitted to a vote of such of the qualified electors of the State as in the year next preceding such election shall have paid a property tax assessed to them within the State, and a majority of those voting thereon shall vote in favor thereof, in such manner as provided by law.

Very similar provisions are found in the constitutions of Idaho<sup>62</sup> and Montana.<sup>63</sup>

Illinois, in the constitution of 1870, also placed a referendal restriction on State expenditures. Section 33, Article IV, reads as follows:

The General Assembly shall not appropriate out of the State treasury or expend on account of the new capital grounds, and construction, completing, and furnishing of the state-house, a sum exceeding in the aggregate \$3,500,000, inclusive of appropriations heretofore made, without first submitting the proposition for an additional expenditure to the legal voters of the State, at a general election; nor unless a majority of all the votes cast at such election shall be for the proposed additional expenditures.

Subjects of general educational interest have also claimed a place in constitutional provisions of this sort—e. g., Texas,<sup>64</sup> in 1876, submitted the matter of the location of the State university to a vote of the people and by separate clause<sup>65</sup> made like provision for the location of a State school for colored persons.

The following subjects, therefore, are found to be in the first class of constitutional provisions for popular co-operation in acts of government, viz.: The annexation of territory and State boundaries, the extension of the suffrage, the incurring of State indebtedness, the

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<sup>62</sup> Ida. Cons., 1889, VII, 90.

<sup>64</sup> Tex. Cons., 1876, VII, 10.

<sup>63</sup> Mont. Cons., 1889, XII, 9.

<sup>65</sup> Tex. Cons., 1876, VII, 14.

lending of the credit of the State, the location of seats of government and State institutions, laws for the incorporation of banking institutions, the sale of school lands, State aid to railways, provisions for education, taxation and appropriations for State purposes. We now pass to a consideration of the second class of constitutional provisions, viz., those providing for popular co-operation in acts of local government.

## II.

The second class of constitutional provisions above referred to—i. e., those providing for the popular co-operation in acts of local government—comprehends a much wider range of subjects than the first. Within this class falls nearly every subject that has come within the range of local option laws. Historically, Tennessee seems to be entitled to the honor of pioneer. The people of that State, in 1834, adopting a new constitution, reserved to themselves the right to co-operate in acts of government involving the change of county lines. Art. X, Sec. 4, of said constitution is in part as follows:

No part of a county shall be taken to form a new county, or a part thereof, without the consent of a majority of the qualified voters in such part taken off.

Following the example of Tennessee, the people of Illinois, in their constitution of 1848,<sup>66</sup> made provision that:

No county shall be divided, or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all legal voters of the county voting on the question shall vote for the same.

A few months later the people of Wisconsin<sup>67</sup> prescribed in the constitution:

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<sup>66</sup> Ill. Cons., 1848, VII, 2.

<sup>67</sup> Wis. Cons., 1848, VIII, 7.

No county with an area of nine hundred square miles or less shall be divided, or have any part stricken therefrom without submitting the question to a vote of the people of the county.

In 1867<sup>68</sup> the constitution of Maryland was so changed that no new county could be organized "without the consent of the majority of the legal voters residing within the limits proposed to be formed into said new county," and whenever it was proposed to form a new county "out of portions of two or more counties" the consent of a majority of the legal voters of such part of each of said counties, respectively, was required; nor could "the lines of any county be changed" without the consent of a majority of the legal voters. The new constitutions of Tennessee, 1870;<sup>69</sup> Michigan, 1850; Ohio, 1851; Illinois, 1870,<sup>70</sup> and the constitutions of Indiana, 1851; Pennsylvania, 1857, and Arkansas,<sup>71</sup> 1874; Maryland, 1864; West Virginia, 1872; Missouri, 1875;<sup>72</sup> Nebraska, 1875;<sup>73</sup> Colorado, 1876;<sup>74</sup> Texas, 1876;<sup>75</sup> Louisiana, 1879; Idaho, 1889;<sup>76</sup> North Dakota, 1889;<sup>77</sup> South Dakota, 1889;<sup>78</sup> Kentucky, 1891;<sup>79</sup> and South Carolina, 1895,<sup>80</sup> contain provisions of similar import.

Michigan restricted the powers of its legislature by providing in its constitution:

No organized county shall ever be reduced by the organization of a new county to less than sixteen town-

<sup>68</sup> Md. Cons., 1867, XIII, 1.

<sup>69</sup> Tenn., 1870, X, 4, required two-thirds of qualified voters.

<sup>70</sup> Ill., 1870, X, 2; Mich., 1850, X, 2; Ohio, II, 30.

<sup>71</sup> Arkansas, 1874, XIII, 2; Ind., 1851, sched., 15; Pa., X, Am., 1857.

<sup>72</sup> Mo., 1875, IX, 3-4; Md., 1864, X, 1; W. Va., 1872, IX, 8.

<sup>73</sup> Neb., 1875, X, 2.

<sup>77</sup> N. Dak., 1889, 162.

<sup>74</sup> Colo., 1876, XIV, 3.

<sup>78</sup> So. Dak., 1889, IX.

<sup>75</sup> Texas, 1876, IX, 1, 3rd.

<sup>79</sup> Ky., 1891.

<sup>76</sup> Idaho, 1889, XVIII; La., 1879, 251.

<sup>80</sup> So. Car., 1895, VII, 2.



ships, as surveyed by the United States, unless in pursuance of a law a majority of the electors residing in each county to be affected shall so decide.<sup>81</sup>

In Ohio<sup>82</sup> the people were made an integral part of the government for these purposes, the constitution providing:

All laws creating new counties, changing county lines, or removing county seats shall, before taking effect, be submitted to the electors of the several counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of all the electors voting at said election in each of the said counties.<sup>83</sup>

The constitution of Georgia, 1868,<sup>84</sup> provided:

Nor shall any county be abolished except by a vote of two-thirds of each house and after the qualified voters shall, at an election held for that purpose, so decide.<sup>85</sup>

And Michigan, 1850:<sup>86</sup>

The legislature may organize any city into a separate county when it has obtained a population of twenty thousand inhabitants without reference to geographical extent when a majority of the electors of a county in which such city may be situated, voting thereon, shall be in favor of a separate organization.<sup>87</sup>

Another form of provision for referendum in changing county boundaries is that found in the constitution of South Carolina, 1895:<sup>88</sup>

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<sup>81</sup> Mich., 1850, X, 2.

<sup>82</sup> Ohio, 1851, II, 30.

<sup>83</sup> See, also, S. Dak., 1889, IX, 1; S. Car., 1895, VII, 7.

<sup>84</sup> Ga., 1868, III, 5.

<sup>85</sup> See, also, Cons. La., 1879, 251.

<sup>86</sup> Mich., 1850, X, 2.

<sup>87</sup> For similar provisions see Minn., 1857, XI, 2.

<sup>88</sup> Const. S. Car., 1895, VII, 10.

The general assembly may provide for the consolidation of two or more existing counties if a majority of the qualified voters of such counties voting at an election held for that purpose shall vote separately therefor, but such election shall not be held oftener than once in four years in the same counties.

The people of Illinois in their constitution of 1848 made two other provisions for popular co-operation in acts of local government, the one having to do with the removal of county seats and the other with the adoption of the township system. Sec. 5 of Art. VII is as follows:

No county seat shall be removed until the point to which it is purposed to be removed shall be fixed by law and a majority of the voters of the county shall have voted in favor of its removal to such point.

Wisconsin<sup>89</sup> the same year adopted like provision, modifying it, however, so that "a majority of the voters of the county voting on the question" could affect the change. In 1851 Ohio made it necessary to submit laws providing for the removal of county seats to popular vote,<sup>90</sup> which was followed by Minnesota in 1857.<sup>91</sup> Kansas in 1859<sup>92</sup> incorporated into its constitution the provision that "no county seat shall be changed without the consent of a majority of the electors of the county," and Tennessee, 1870,<sup>93</sup> that "where an old county is reduced for the purpose of forming a new one the seat of justice in said old county shall not be removed without the concurrence of two-thirds of both branches of the legislature, nor shall the seat of justice of any county be removed without the concurrence of a two-thirds majority of the qualified voters of the county."

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<sup>89</sup> Const. Wis., 1848, XIII, 8.

<sup>90</sup> See page 224.

<sup>91</sup> Cons. Minn., 1857, XI, 1.

<sup>92</sup> Cons. Kan., 1859, IX, 1.

<sup>93</sup> Cons. Tenn., 1870, X, 4.

Illinois, the same year,<sup>94</sup> enlarged upon the provisions of 1848 by requiring three-fifths of the voters of the county for removal of county seat, and, further, "that no person shall vote on such question who has not resided in the county six months and in the election precinct ninety days next preceding such election," and the question could not be submitted oftener than once in ten years, "but when an attempt is made to remove a county seat to a point nearer to the center of the county, then a majority vote only shall be necessary." In 1874 the constitution of Arkansas<sup>95</sup> required that "no county seat shall be established or changed without the consent of a majority of the qualified voters of the county to be affected \* \* \* nor until the place at which it is proposed to establish or change such county seat shall be fully designated." In 1875 the constitution of Missouri<sup>96</sup> took away from the legislature the power to remove county seats and required that their removal should be only by general law; and that no county seat should be removed "unless two-thirds of the qualified voters of the county voting on the proposition at a general election vote therefor." The other constitutions that have required the use of the referendum in questions of removal or establishments of county seats are Texas<sup>97</sup> 1876, Georgia<sup>98</sup> 1877, Louisiana<sup>99</sup> 1879, California<sup>1</sup> 1880, Idaho<sup>2</sup> 1889, South Dakota<sup>3</sup> 1889, Washington<sup>4</sup> 1889, Montana<sup>5</sup> 1889, Mississippi<sup>6</sup> 1890, Kentucky<sup>7</sup> 1891, South Carolina<sup>8</sup> 1895. It would therefore appear that about half of the States have come to em-

<sup>94</sup> Cons. Ill., 1870, X, 4.

<sup>95</sup> Cons. Ark., 1874, XIII, 3.

<sup>96</sup> Cons. Mo., 1815, IX, 2.

<sup>97</sup> Cons. Texas, 1876, IX, 2.

<sup>98</sup> Cons. Ga., 1877, XI, 4.

<sup>99</sup> Cons. La., 1879, Art. 250.

<sup>1</sup> Cons. Cal., 1880, XI, 2.

<sup>2</sup> Cons. Ida., 1889, XVIII

<sup>3</sup> Cons. S. Dak., 1889, IX, 2.

<sup>4</sup> Cons. Wash., 1889, XI, 2.

<sup>5</sup> Cons. Mont., 1889, XVI, 2.

<sup>6</sup> Cons. Miss., 1890, 269.

<sup>7</sup> Cons. Ky., 1891, 64.

<sup>8</sup> Cons. S. C., 1895, VII, 8.

ploy this method of determining such questions, and this half comprises nearly all of the States in which changes are liable to be made in the course of the development of the country. In these latter constitutions it is quite common to find a two-thirds vote required.

The optional provision of the constitution of Illinois, adopted in 1848, that "the general assembly shall provide, by general law, for a township organization under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine," was continued in the constitution of 1870<sup>9</sup> of that State and was followed by Nebraska 1875,<sup>10</sup> Missouri 1875,<sup>11</sup> California 1880,<sup>12</sup> Washington 1889,<sup>13</sup> and North Dakota 1889.<sup>14</sup> But the constitution of Illinois 1870,<sup>15</sup> Missouri<sup>16</sup> and Nebraska,<sup>17</sup> 1875, and North Dakota, 1889,<sup>18</sup> further provided that if any county shall have adopted "township organization" the question of continuing the same may be submitted to a vote of the electors of such county at a general election and if a majority of all votes cast upon that question shall be against township organization it shall cease in said county and all the laws in force in counties not having township organization shall immediately take effect there.

In 1850 the people of Virginia, in order to determine on the most satisfactory principle of appointing representatives and settle the basis of representation, resorted to the following unique device:

It shall be the duty of the general assembly in the year one thousand eight hundred sixty-five, and in every tenth year thereafter, in case it can agree upon a prin-

<sup>9</sup> Cons. Ill., 1870, X, 5.

<sup>10</sup> Cons. Neb., 1875, X, 5.

<sup>11</sup> Cons. Mo., 1875, IX, 8.

<sup>12</sup> Cons. Cal., 1880, XI, 4.

<sup>13</sup> Cons. Wash., 1889, XI, 4.

<sup>14</sup> Cons. N. Dak., 1889, 170.

<sup>15</sup> Cons. Ill., 1870, X, 5.

<sup>16</sup> Cons. Mo., 1875, IX, 9.

<sup>17</sup> Cons. Neb., 1875, X, 5.

<sup>18</sup> Cons. N. Dak., 1889, 171.

ciple of representation, to reapportion representation in the senate and house of delegates in accordance therewith; and in the event of the general assembly, at the first or any subsequent period of reapportionment, shall fail to agree upon a principle of representation and to reapportion representation therewith, each house shall separately propose a scheme of representation containing a principle or rule for the house of delegates in connection with a principle or rule for the senate, \* \* \* and the governor shall, as soon thereafter as may be, by proclamation, make known the proposition of the respective houses, and require the voters of the commonwealth to assemble at such time as he shall appoint, at their lawful places of voting, and decide by their votes between the propositions thus presented. In the event the general assembly shall fail, in the year one thousand eight hundred and sixty-five, or in any tenth year thereafter, to make such reapportionment or certificate, the governor shall, immediately after the adjournment of the general assembly, by proclamation, require the voters of the commonwealth to assemble, at such time as he shall appoint, at the lawful places of voting to declare by their votes:—

First, whether representation in the senate and house of delegates shall be apportioned on the “suffrage basis;” that is, according to the number of votes in the several counties, cities, towns and senatorial districts of the commonwealth;

Or, second, whether representation in both houses shall be apportioned on the “mixed basis;” that is, according to the number of white inhabitants contained and the amount of all State taxes paid in the several counties, cities and towns of the commonwealth; \* \* \*

Or, third, whether representation shall be apportioned in the senate on taxation; that is, according to the amount of all State taxes paid in the several counties, cities and towns of the commonwealth, \* \* \* and in the house of delegates on the “suffrage basis” as aforesaid;

Or, fourth, whether representation shall be apportioned in the senate on the “mixed basis” as aforesaid, and in the house of delegates on the “suffrage basis” as

aforesaid; and each voter shall cast his vote in favor of one of the said schemes of apportionment, and no more.<sup>18</sup>

As the civil war intercepted any legislative action on the choice of one of the principles set forth in the constitution, this provision remains only as evidence of a desire on the part of the people to have a voice in the matter of legislative apportionments.

The next subject of action on the part of constitutional conventions in making provision for the use of the referendum in matters of local government was that of local taxation. In this Maryland holds the place of pioneer. By its constitution of 1864, Art. VIII, Sec. 5, it provided that:

The general assembly shall levy at each regular session after the adoption of the constitution an annual tax of not less than ten cents on each one hundred dollars of taxable property throughout the State for the support of the free public schools; \* \* \* Provided, That the general assembly shall not levy any additional school tax upon particular counties, unless such county express by popular vote its desire for such tax.

The example of Maryland has been followed by a number of States. These States providing for the referendum on laws to increase the rate of taxation for school purposes are: Missouri, 1875;<sup>19</sup> Texas, 1876,<sup>20</sup> and Florida, 1885.<sup>21</sup> Those making like provision for city purposes are: Missouri, 1875;<sup>22</sup> Louisiana, 1779,<sup>23</sup> Those providing for referendum to authorize an increased tax rate in counties: Texas, 1868;<sup>24</sup> Illinois, 1870;<sup>25</sup> Nebraska, 1875;<sup>26</sup> West Virginia, 1872;<sup>27</sup> Mis-

<sup>18</sup> Cons. Va., 1850, IV, 5.

<sup>19</sup> Cons. Mo., 1875, X, 11.

<sup>20</sup> Cons. Texas, 1876, XI, 10.

<sup>21</sup> Cons. Fla., 1885, XII, 10.

<sup>22</sup> Cons. Mo., 1875, X, 11.

<sup>23</sup> La. Cons., 1879, 209.

<sup>24</sup> Cons. Texas, 1868, XII, 32

<sup>25</sup> Cons., Ill., 1870, IX, 8.

<sup>26</sup> Cons. Neb., 1875, IX, 5.

<sup>27</sup> Cons. W. Va., 1872, X, 7.

souri, 1875,<sup>28</sup> and Louisiana, 1879.<sup>29</sup> The provision adopted by Missouri is most interesting, as by it the people have specifically defined the rate which may be imposed by their officers or agents in the several local departments of government and then bound themselves not to increase it except for certain specific purposes, and in these by their assent only. The provision is as follows:

Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation, but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. For county purposes, the annual rate on property in counties having six million dollars, or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars' valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars' valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars' valuation; and in counties having thirty millions dollars, or more, said rate shall not exceed thirty-five cents on the hundred dollars' valuation. For city and town purposes, the annual rate on the property in cities and towns having thirty thousand inhabitants or more, shall not, in the aggregate, exceed one hundred cents on the hundred dollars' valuation; in cities and towns having less than thirty thousand and over ten thousand inhabitants, said rate shall not exceed sixty cents on the hundred dollars' valuation; in cities and towns having less than ten thousand and more than one thousand inhabitants said rate shall not exceed fifty cents on the hundred dollars' valuation; and in towns having one thousand inhabitants or less, said rate shall not exceed twenty-five cents on the hundred dollars' valuation. For school purposes in districts, the annual rate on property shall not exceed forty cents on the hundred dollars' valuation: Provided, The aforesaid annual rates for school purposes may be increased in districts

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<sup>28</sup> Cons. Mo., 1875, X, 11.

<sup>29</sup> La. Cons., 1879, 209.

formed of cities and towns to an amount not to exceed one dollar on the hundred dollars' valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars' valuation, on the condition that a majority of the voters who are taxpayers, voting at an election to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district voting at such election shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes, and the rate allowed to each city and town by the number of inhabitants according to the last census taken under the authority of the State or the United States; said restrictions, as to rates, shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness.

This provision, as may be seen, is most general in scope and specific in its application, covering county, city and school district assessments. The provision of the constitution of Texas, 1876,<sup>30</sup> relates only to cities and towns which have been erected into separate and independent school districts, requiring a two-thirds vote of the taxpayers to levy a tax for school purposes. That of the constitution of Florida, 1885,<sup>31</sup> is more general. It recites that the legislature may provide:

For the levying and collection of a district school tax, for the exclusive use of public free schools within the district whenever a majority of the qualified electors thereof that pay a tax on real or personal property shall vote in favor of such levy.

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<sup>30</sup> Cons. Texas, 1876, XI, 10.    <sup>31</sup> Cons. Fla., 1885, XII, 10.



As to those providing for the use of the referendum in strictly county levies, the constitution of Texas, 1868,<sup>32</sup> required:

A vote of two-thirds of the qualified voters of the respective counties to assess and provide for the collection of a tax upon the taxable property, to aid in the construction of internal improvements.

The Illinois constitution, 1870,<sup>33</sup> prescribed that:

County authorities shall never assess taxes, the aggregates of which shall exceed seventy-five cents per one hundred dollars' valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county.

West Virginia, 1872:<sup>34</sup>

County authorities shall never assess taxes in any one year the aggregate of which shall exceed ninety-five cents per one hundred dollars' valuation, except for the support of free schools, payment of indebtedness existing at the time of the adoption of this constitution, and for the payment of any indebtedness with the interest thereon, created under the succeeding section,<sup>35</sup> unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three-fifths of all the votes cast for and against it.

Nebraska, 1875,<sup>36</sup> employed the provision above set forth from the Illinois constitution, while Louisiana, 1879,<sup>37</sup> provided:

That for the purpose of erecting and constructing public buildings, bridges and works of public improve-

<sup>32</sup> Cons. Texas, 1868, XII, 32.      vided for incurring indebtedness

<sup>33</sup> Cons. Ill., 1870, IX, 8.      by the referendum.

<sup>34</sup> Cons. W. Va., 1872, X, 7.      <sup>36</sup> Cons. Neb., 1875, IX, 5.

<sup>35</sup> The succeeding section pro-      <sup>37</sup> Cons. La., 1879, Sec. 209.

ment in parishes and municipalities, the rate of taxation \* \* \* may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of property taxpayers of such parish or municipality entitled to a vote under the election laws of the State, and a majority of the same voting at such election shall have voted therefor.

Such are the constitutional provisions for the use of the referendum in school districts, counties and cities when an increase in the rate of taxation is desired. The constitution of South Carolina contains a unique provision that:

Cities and towns may exempt from taxation, by general or special ordinance, except for school purposes, manufactures established within their limits for five successive years from the time of the establishment of such manufactures; Provided, That such ordinance shall be first ratified by a majority of such qualified electors of such city or town as shall vote at an election held for that purpose.<sup>38</sup>

The fifth subject of referendum in local matters is that of "Debt and Stockholding," and the constitution of Missouri,<sup>39</sup> 1865, is the first that comes under our notice. Sec. 14 of Art. XI is as follows:

The general assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to, any company, association or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.<sup>40</sup>

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<sup>38</sup> Cons. of S. Car., 1895, VIII, 8.

<sup>39</sup> Cons. of Mo., 1865, XI, 14.

<sup>40</sup> Those States enacting similar provisions are North Carolina, 1868, VII, 7; Mississippi, 1868, XII, 14; Arkansas, 1868, X, 6; Tennessee, 1870, II, 29; (Tennessee, however, required a vote of three-fourths of the legal voters.)

In 1867 Maryland<sup>41</sup> placed a restriction on the mayor and council of the city of Baltimore, providing that:

From and after the adoption of this constitution no debt (except as herein excepted) shall be created by the mayor and city council of Baltimore; nor shall the credit of the mayor and city council of Baltimore be given or loaned to, or in aid of, any individual, association, or corporation; nor shall the mayor and city council of Baltimore have the power to involve the city of Baltimore in the construction of works of internal improvements, nor in granting any aid thereto which shall involve the faith and credit of the city, nor make any appropriation therefor, unless such debt or credit be authorized by an act of the General Assembly of Maryland, and by an ordinance of the mayor and city council of Baltimore, submitted to the legal voters of the city of Baltimore, at such time and place as may be fixed by said ordinance, and approved by a majority of the votes cast at such time and place.

This measure was special in its nature, applying to Baltimore only.

In 1872 West Virginia adopted a general provision in form different from that quoted from the Missouri constitution, 1865;<sup>42</sup> it was followed by the constitutions of Mississippi, North Carolina and Arkansas, 1868, and Tennessee, 1870.<sup>43</sup> This provision reads as follows:

No county, city, school district or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual

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<sup>41</sup> Cons. Md., 1867, XI, 7.

<sup>42</sup> See page 233, n. 39.

<sup>43</sup> See page 225.

tax sufficient to pay, annually, the interest on such debt and the principal thereof within not exceeding thirty-four years: Provided, That no debt shall be contracted under this section, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same.<sup>44</sup>

The Pennsylvania constitution of 1873<sup>45</sup> has the following:

The debt of any county, city, borough, township, school district or other municipality or other incorporated districts, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof at a public election, in such manner as shall be provided by law.

Following this, in 1889,<sup>46</sup> Washington made similar provisions, the maximum rate of indebtedness, without popular vote, being fixed at one and one-half per cent, instead of two, the vote necessary to incur a debt of greater amount being three-fifths of all within the district incurring the same, and the maximum rate with the consent of the voters not to exceed:

Five percentum on the value of taxable property therein, to be ascertained by the last assessment. \* \* \* Providing, further, that any city or town with such assent may be allowed to become indebted to a larger amount, but not exceeding five percentum additional, for the supplying such city or town with water, artificial light and sewers when the works for supplying such water, light

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<sup>44</sup> See, also, Cons. Md., 1875, X, 12, and S. Car., 1895, VIII, 7, for same provisions.

<sup>45</sup> Cons. Pa., 1873, IX, 8.

<sup>46</sup> Wash. Cons., 1889, VIII, 6.

and sewers shall be occupied and controlled by the municipality.<sup>47</sup>

Nebraska, in its constitution adopted in the year 1875,<sup>48</sup> made provision that:

No city, county, town, precinct, municipality, or other subdivisions of the State shall ever make donations to any railroad or other work of internal improvement, unless a proposition so to do shall have been first submitted to the qualified voters thereof at an election by authority of law: Provided, That such donations of a county with the donations of such subdivisions in the aggregate shall not exceed ten per cent of the assessed valuation of such county; Provided further, That any city or county may, by a two-thirds vote, increase such indebtedness five per cent in addition to such ten per cent. \* \* \*

As to county debts the constitution of Colorado, 1876,<sup>49</sup> provides:

No county shall contract any debt by loan in any form, except for the purpose of erecting necessary buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon taxable property in such county following, to-wit: Counties in which the assessed valuation of property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof; and the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last

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<sup>47</sup> Georgia (Cons. 1877, VII, 7) also made provision quite similar to Pennsylvania quoted above, except the maximum rate allowed without referendum is one and one-half per cent.

<sup>48</sup> Neb. Cons., 1875, XII, 2.      <sup>49</sup> Colo. Cons., 1876, XI, 6.

preceding such election shall have paid a tax upon property assessed to them in such county and a majority of those voting thereon shall vote in favor of incurring the debt, etc.

As to school districts:<sup>50</sup>

No debt by loan in any form shall be contracted by any school district for the purpose of erecting and furnishing school buildings or purchasing grounds, unless the proposition to create such debt shall first be submitted to such qualified electors of the district as shall have paid a school tax thereon in the year next preceding such election, and a majority of those voting thereon shall vote in favor of incurring such debt.

As to cities and towns:<sup>51</sup>

No city or town shall contract any debt by loan, in any form, except by means of an ordinance, which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged, specifying the purposes to which the funds to be raised shall be applied, and providing for the levy of a tax, not exceeding twelve mills on each dollar of valuation of taxable property within such city or town, sufficient to pay the annual interest and extinguish the principal of such debt within fifteen, but not less than ten, years from the creation thereof; \* \* \* but no such debt shall be created unless the question incurring the same shall, at a regular election for councilmen, aldermen, or officers of such city or town, be submitted to a vote of such qualified electors thereof as shall, in the year next preceding, have paid a property tax therein, and a majority of those voting on the question, by ballot deposited in a separate ballot box, shall vote in favor of creating such debt; but the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not at any time exceed three per cent of the valuation. \* \* \* Debts contracted for supplying water to such city or town are excepted from the operation of this section.

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<sup>50</sup> Cons. Colo., 1876, XI, 7.

<sup>51</sup> Cons. Colo., 1876, XI, 8.

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Texas, in her constitution of 1876,<sup>52</sup> limited the powers of government as to incurring general indebtedness, but made special provision for incurring indebtedness for building levees in districts subject to overflow, by referendum.

Idaho<sup>53</sup> provided as follows:

No county, city, town, township, board of education or school district, or other subdivision of the State, shall incur any indebtedness or liability in any manner or for any purpose exceeding in that year the income and revenue provided for it for such year, without the consent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay interest on such indebtedness as it falls due, and also to constitute a sinking fund, etc.

Similar provision was made in California in 1892, by amendment.

In 1895 South Carolina, besides following the example of West Virginia,<sup>54</sup> with slight changes,<sup>55</sup> also made provision<sup>56</sup> that:

Cities and towns may acquire by construction or purchase, and may operate, water works, systems and plants for furnishing light, and may furnish water and lights to individuals, firms and private corporations for reasonable compensation; Provided, That no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness of said cities and towns.<sup>57</sup>

Other questions have been made subject for referendal

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<sup>52</sup> Cons. Texas, 1876, XI, 7.

<sup>53</sup> Cons. Idaho, 1889, X, 3.

<sup>54</sup> Cons. W. Va., 1872, X, 7,

<sup>55</sup> Cons. S. Car., 1895, VIII, 7.

<sup>56</sup> Cons. S. Car., 1895, VIII, 5.

<sup>57</sup> Cons. S. Car., 1895, II, 13.

see page 234.

provisions in the constitution, such as changing the lines of judicial districts, deciding whether judges shall be elected or appointed, whether proportional representation shall be adopted, whether new courts shall be formed, question as to the number of aldermen and justices of the peace to be chosen in a district or ward, etc. Thus, in 1868, the Texas constitution<sup>58</sup> provided as follows:

The State shall be divided into convenient judicial districts, for each of which one judge shall be appointed by the governor, by and with the advice and consent of the senate, for a term of eight years. \* \* \* Provided, That at the first general election after the 4th of July, 1876, the question shall be put to the people whether the mode of election of judges of the Supreme and District courts shall now be returned to.

And in 1869 New York,<sup>59</sup> following the example of Texas, made provision that:

The legislature shall provide for submitting to the electors of the State, at the general election of the year eighteen hundred and seventy-three two questions to be voted upon on separate ballots, as follows: First, "Shall the offices of chief judge and associate judge of the Court of Appeals, and of justice of the Supreme Court, be hereafter filled by appointment?" If a majority of the voters upon the question shall be in the affirmative, the said officers shall not thereafter be elected, but as vacancies occur, they shall be filled by appointment by the governor, by and with the advice of the senate; or if the senate be not in session, by the governor; but in such case he shall nominate to the senate when next convened, and such appointment by the governor alone shall expire at the end of that session. Second, "Shall the offices of judges mentioned in sections twelve and fifteen of article six of the constitution [judges of the Superior Court of New York city, the Court of Common Pleas of New York city, the Superior Court of Buffalo, the City Court of Brook-

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<sup>58</sup> Cons. Texas, 1868, V, 6.

<sup>59</sup> Am. Cons. N. Y., 1869, Sec. 15.



lyn and the County Courts throughout the State] be hereafter filled by appointment?" If a majority of the votes upon the question shall be in the affirmative, and said officers shall not thereafter be elective, but as vacancies occur they shall be filled in the manner in this section above provided.

In 1872 West Virginia<sup>60</sup> made provision for the use of the referendum in the reform and modification of county courts already established and for the establishment of new tribunals, as follows:

The legislature shall, upon the application of any county, reform, modify, or alter the county court established by this constitution in such county, and in lieu thereof, with the assent of a majority of the voters of said county voting at any election held for that purpose, create another, court or other tribunals, as well for judicial as for police and fiscal purposes, either separate or combined, which shall conform to the wishes of the county making the application, but with the same powers and jurisdiction herein conferred upon county court, and with compensation to be made from the county treasury.

West Virginia, in the same constitution, Art. VI, Sec. 50, also provided for the submission of the question of proportional representation, as follows:

The legislature may provide for submitting to a vote of the people at the general election to be held in 1876, or at any general election thereafter, a plan or scheme of proportional representation in the senate of this State; and if a majority of the votes cast at such election be in favor of the plan submitted to them, the legislature shall, at its session succeeding such election, rearrange the senatorial districts in accordance with the plan so approved by the people.

Pennsylvania, in its last constitution, 1873,<sup>61</sup> adopted a provision for referendum as to the number of justices of

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<sup>60</sup> Cons. W. Va., 1872, VIII, 34.

<sup>61</sup> Pa. Cons., 1873, V, 11.

the peace and aldermen to be elected in the several wards, districts, etc., the provision being:

No township, ward, district, or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward, or borough.

Summarizing the constitutional provisions for popular co-operation in acts of local government, the subjects are as follows: Change of county lines, the division of counties, the annexation of territory to counties, the organization of new counties, the abolition of old ones, the organization of cities into separate counties, the establishment and removal of county seats, optional township or county organizations, the abandonment of township organization, the basis of apportionment of representatives, county taxes, city taxes, school taxes, the exemption of certain properties from taxation, local debt, stock holding, loaning credit, etc., the acquiring of water works and plants for light, changing the lines of judicial districts, the formation of new courts, the manner of filling judicial offices, proportional representation, and the number of justices of the peace and aldermen to be elected.

## CHAPTER XI.

CAUSES OF THE GROWTH OF DEMOCRACY, OR  
CONDITIONS WHICH HAVE MADE CHANGES  
IN OUR INSTITUTIONS NECESSARY.

It has been postulated of all human activities that they are the result of fixed and definite laws; that, conditions remaining constant, these activities will continue the same indefinitely. Habit is held to be the result of continued activity of a particular kind. The individual, having first chosen to act in a certain manner under certain conditions, this manner of action appearing to be most advantageous, he continues to act in like manner under like conditions. But with each repetition of the act both mind and body acquire such increased facility of action in this particular direction that it will require a constantly greater effort to act in any other. In other words, by the law of habit, other things being equal, repetition of an act is of constantly increasing advantage to the individual.<sup>1</sup>

The same has been postulated of society, and, it being true of the individual on the principle that what is true of

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<sup>1</sup> Not only was habit the conservative force employed and relied on in establishing and maintaining institutions under ancient military rule, an order of things in which personal status was the prevailing idea, but also under the modern industrial regime, where the governing principle was shifted from status to that of economic efficiency. It was found that by repetition a man became more efficient. The success of co-operative industry is attributable to this fact. Why adopt the principle of division of labor? Why differentiate industry? The greater facility of action gained by repetition, the utility of habit explains. The same may be said of our complex system of government. Wherever there is specialization the economic basis is found in this principle.

each of the parts is true of all, it follows. In social activities, however,—i. e., the activities of the individual co-operating with others,—this fact becomes much intensified for the reason that it requires far greater effort for a number of men to agree on a plan of co-operation than for one man to make a decision for himself. Therefore, the habits or customs of men acting in co-operation are the more firmly fixed. The social inertia becomes great; there is an increasing tendency for the individual member of society to continue to act according to custom instead of varying his action with every new condition. This being true, the stability of our institutions needs no other explanation.

But what of the element of change? If change in the individual comes from change in environment, this also would follow in the social organism. New conditions may cause the individual to suffer to such an extent that he may choose to act in a different manner than he has acted before. If he acts alone and in contravention of the established order, he becomes a law-breaker or a criminal, and he may be required to suffer still greater hardship in the interest of society. If, however, he acts with a sufficient number of others they may set aside the custom or law and adopt a new rule of action which is deemed by them more advantageous. Basing the evolution of society on the law of advantage, it is only when conditions are so altered as to make it of sufficient advantage for a majority of the members of a political society to alter their customs and laws rather than continue to act in the same manner that change will take place. What, then, were the altered conditions, what the new environment that dictated to Americans the advantage to be obtained by change in their customs, laws and institutions?

As shown in Chapter II, the first and most important fact that the colonists had to face was a new continent.

Around them was a wilderness which offered neither adequate shelter nor easy means of sustenance—a continent untouched by the hand of civilized man, uninhabited, except by wild beasts and savages, having all of the possibilities of wealth, but, at the outset, offering in return for toil and risk but a scanty livelihood. Their environment was entirely changed and to have continued their former habits and customs would have meant certain extermination. To have insisted on the establishment here of the institutions and conventions of the old world would have made colonization impossible. Conforming themselves to conditions, modifying their institutions so as to adapt them to the welfare of this new society, the colonies grew in population and wealth; they extended their industry far to the north, the south, and the west; they made the resources of the western world a prize to their efforts. Change in institutions followed change in conditions. The experience of the colonists was a new school in which they learned to adapt themselves to environment in such manner as would be of greatest advantage. In all their establishments the general welfare was their central thought; the principle both for sustaining the established order and for modifying it.

As the struggle with nature for her fruits became more favorable to the colonists, the struggle of society for their enjoyment became more intense. Absolutism again reached out to secure the colonies within its grasp and make them subservient to arbitrary power. It was resisted. The whole power of the colonies was finally roused and asserted against such an assumption. They denied the fundamental maxim, "The King [the conqueror] is the source of all power." They respected not the precept, "The King can do no wrong." On the other hand, they conceived a notion "that all power is vested in and consequently derived from the people; that magistrates are their trustees and servants;" and upon this no-

tion, as a fundamental concept, without precedents except those evolved from their own experience, and with no light from the old world to guide them except certain beacons "which gave warning of the course to be shunned without pointing out that which ought to be pursued," they were left free to organize their government and adopt such a polity as they themselves, as a sovereign people, might evolve. It was the story of the Dutch Republic, of the English revolution, over again, but under more favorable conditions. The effect of the war had been to unite the people in one purpose, one political idea. They were accustomed to self-government. Without the disturbing ideals of King, court or titled nobility, animated by a spirit of public equality, discarding the whole predatory polity of the past and relying on their own experience in government for the benefit of the governed, they set about to build up a governmental system based on such principles as would guarantee to themselves the liberties for which they had fought, preserve their sovereignty and make their governors their "trustees and servants" instead of their masters—the most extraordinary task ever undertaken by a political people.<sup>2</sup>

But they arose to the occasion. In 1787 there met in Philadelphia a congress of nation-builders—men who were pre-eminent among a nation-building people.

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<sup>2</sup> "It is hard to-day, even for Americans, to realize how enormous these difficulties were. The convention had not only to create *de novo*, on the most slender basis of pre-existing national institutions, a national government for a widely scattered people, but also in doing so they had to respect the fears and jealousies and apparently irreconcilable interests of thirteen separate commonwealths, to all of whose governments it was necessary to leave a sphere of action wide enough to satisfy a deep-rooted local sentiment, yet not so wide as to imperil national unity."—Madison.

"The establishment of a constitution, in time of profound peace, by the voluntary consent of a whole people is a prodigy to the completion of which I look forward with trembling anxiety."—Hamilton.

Hardly one among them but had sat in some famous assembly, had signed some famous document, had filled some high place or had made himself conspicuous for learning, for scholarship or for signal services rendered in the cause of liberty. One had framed the Albany plan of union; some had been members of the Stamp-Act Congress of 1765; some had signed the Declaration of Rights in 1774; the names of others appear at the foot of the Declaration of Independence and at the foot of the Articles of Confederation; two had been presidents of Congress, one had commanded the armies of the United States; another had been Superintendent of Finance; a third had repeatedly been sent on important missions to England and had long been minister to France.<sup>3</sup>

After five months of secret session, with the failures of the past before them and the dangers of the present around, inspired by patriotic impulses, in the spirit of mutual concession, these men evolved an imperial plan of government, the prime purpose of which was to protect the people against predation, and to promote their common interest—a plan which has since served as a model to which the statescraft of the century has been working.<sup>4</sup>

But the institutional changes during the national period have been quite as numerous as those which took place during the colonial, the conditions giving rise to these modifications quite as varied.

In the first place, the government being favorable to the material welfare of the people, the political conditions were present for greatest prosperity. There was a remarkable increase in population and wealth. America led the world in invention, and in industrial organization. There was a rapid development of whole empires of new

<sup>3</sup> MacMaster, *With the Fathers*, p. 112.

<sup>4</sup> "After all deductions it ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances, the simplicity, brevity and precision of its language, its judicious mixture of definiteness in principle and elasticity in details."—Bryce, p. 28.

resources in the West and South. Large fortunes were amassed. Corporate franchises and privileges granted for control of industrial forces became most valuable. The whole economic situation was recast.

In the second place, political parties were found prerequisite to the exercise of popular government. The establishment of a polity based on the popular will made necessary expressions of popular opinion in matters of public concern. The expression of popular opinion involved discussion and division among the people, and division among the people created political parties. No sooner had the plan of government devised by the constitutional convention been submitted to the people than there was a division on the question of the advisability of its adoption. In this untried experiment which they were about to make many saw the seeds of anarchy, while others received it with suspicion because of its providing for a too rigid enforcement of Federal law. The plan called forth heated discussion on all sides. To one party a powerful Federal authority seemed essential, to the other a weak central and a powerful State government seemed best. This was the dividing line. The statesmen divided; the people divided; the whole nation, with all the earnestness displayed in the prosecution of the Revolution, entered into the discussion, and the constitution was finally established as the result. In the operation of this new plan, on every occasion where the people took an active part, we find divisions made, not for or against the government but for or against change. This is the great dividing line between popular parties. The question is always before them: Shall the present order remain or shall it be modified so as better to conform to conditions present? For the purpose of making the government responsive to popular will every facility is given to popular discussion and expression. No sooner is expression made on one question than the popular atten-



the very essence of

becoming great, and this seemed to whet the appetite to produce the modern government. The conflict between the executive and the legislative, acting through the courts, have been made a national establishment of conflict. The struggle which the government as well as the individual party.

The version of the fundamental ends were first made in the New York constitution was a political end. In that provision was made for the State, from the peace, were a senator from each district at first exercised very prominently, but during the decade the power of the State was a perpetuation of the power to be used for private ends. There was built up a system as the world has seen. The State has not yet reached the early history of the Republic. The executive and judicial offices of the party leaders, elected or subsequently elected, most shameless body of

public despoilers. The functions of government were prevented. The powers of the State were used in the interests of the ruling class. Not only the public properties were placed at the disposal of partisans, but private concerns were dominated and monopolies granted on a purely party basis. Charters of corporations and franchises, being granted by the legislature, were sought for and obtained by friends of the administration and denied to all others. An example of this is found in the chartering of the Manhattan Bank (1798-99). At this time the Bank of New York was in the hands of the Federalists. The Manhattan Bank was chartered in the interests of the Republicans, and the government being in the hands of the opposition, it became necessary to employ strategy to accomplish their end.

The scheme of chartering this company was formed and mainly executed by Col. [Aaron] Burr. The bill was so drawn as to enable Col. Burr and his Republican friends to get control of a majority of the stock, and of course of the funds of the company. It is an admitted fact that a large majority of the legislature, at the time they granted this charter, did not know that it contained a charter of banking powers.<sup>5</sup> \* \* \*

The next bank chartered, which partook of a party character, was the New York State Bank, at Albany. The applicants for the charter of this institution alleged that the Bank of Albany was owned by Federalists, and that its power was wielded in such manner as to be oppressive to those business men who belonged to the republican party. \* \* \* They were open and frank in declaring the object of their application and the reasons on which it was founded. But, as proof of the monopolizing and greedy spirit of men, a part of whose business it was to drive bank charters through the legislature, truth compels me to state that this republican company had connected with their application a most gigantic scheme of speculation, if not of peculation. They peti-

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<sup>5</sup> Hammond, I, 129.

... act by which the  
... grant might be  
... given them, of the  
... time, say, sixty  
... value of the salt  
... the State, and the  
... expense of manufac-  
... ter made to put the  
... the same quality salt  
... can be manufac-  
... eastern members, who  
... which a lease of the  
... would confer on the  
... and the company  
... that provision of the  
... out, one would have  
... have been sure of suc-  
... the bill. But the com-  
... presented, had agreed on  
... selves and reserved a  
... members of the legis-  
... rit of Luther Rich, a  
... ago, and several other  
... that those members  
... stock, with a further  
... above par. This was  
... practice.<sup>7</sup>

... quite similar parent-  
... ~~serv~~ of the promoters,  
... by the legislature.  
... offered an extravagant  
... capital, provided no  
... by the State within  
... was to be loaned to  
... be used in canal build-  
... loaned to the farmers. This  
... The managers employed a

<sup>7</sup> Hammond. I. 329.

large number of agents, some of whom were members of the legislature itself.<sup>8</sup>

From the affidavits of Silas Holmes, Nathaniel Cobb, Bennett Bicknell, A. C. Comstock and Isaac Ogden, all members of the legislature, which will be found at large on the journals of the house of the assembly for 1812, it is evident that most shameless attempts were made to corrupt the members, and there is too much reason to believe, that in some instances, those attempts were successful. One is pained and sickened at the evidence these depositions afford to the degeneracy of human nature. John Martin, the preacher, whom I have mentioned as the sub-agent of the bank, was convicted of attempting to bribe members of the legislature, contrary to the statute of 1806, and sentenced to confinement in the State prison. I have before alluded to the trial of Mr. Southwick [one of the managers] for an attempt to bribe Mr. Speaker Sheldon, and I shall not take up the time of the reader by relating the particulars which were disclosed in relation to the disgraceful transaction connected with the incorporation of this institution.<sup>9</sup>

In 1804, application having been made for a charter by The Merchants' Bank, a banking co-partnership in New York, not only was the charter denied, it being promoted largely by Federalists, but the legislature passed an act "restricting banking of all unincorporated companies under severe penalties, and declaring all notes or other securities for the payment of money to such unincorporated

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<sup>8</sup> "Mr. Southwick and the other managers had early employed a great number of sub-agents, some of whom were officers of the house of assembly, but most of them were low, worthless fellows, who were to carry messages, and listen to what was said by the members, at their rooms and other places, and report at headquarters. Among other agents thus employed was an Irishman by the name of John Martin, who, from being an itinerant preacher of the Gospel, had for a year or two devoted himself to the labor of making political converts. So numerous were these sub-agents that not only the doors of the two houses but the rooms of members, were besieged by them."

<sup>9</sup> Hammond, I, 335, et seq.

companies absolutely void,"<sup>10</sup> thus compelling all who would do a banking business to purchase the privilege from the legislature or become subservient to a party.

In 1805 The Merchants' Bank bribed the legislature and in this manner procured their charter.<sup>11</sup>

In 1821 the people of the State, with a view to putting an end to such practices, changed their constitution in such manner as to render it necessary to obtain the assent of two-thirds of both houses in order to incorporate moneyed institutions. The only effect was to make bribery more bold, as is evidenced by the corruption practiced in the session of 1824-5 in procuring a charter for the Chemical Bank of New York, at present one the greatest monetary institutions of the world.

The subversion of the functions of government for the accomplishment of private and party ends was not con-

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<sup>10</sup> Id. I, 219.

<sup>11</sup> "The Merchants Bank Company, at the session of 1805, made another great and vigorous effort to obtain a charter. It is not my intention here to detail the facts in relation to this application, further than to state that it was originally opposed by The American Citizen and Albany Register on party grounds, not because the chartering of this bank would be prejudicial to the public interest, but because the applicants were principally Federalists. Eventually, it is true, it appeared that the company did resort to vile and corrupt means to obtain their end. It was proved that several members of the legislature had been tampered with and Judge Purdy, who introduced in the senate the bill to incorporate the company, was compelled to resign his seat to avoid expulsion for bribery."—Hammond, I, p. 219.

<sup>12</sup> "During the November session, a complaint was made that the passage of the bill for chartering this bank had been procured by corrupt means. An investigation was ordered, and a committee appointed with powers to send for persons and papers. The evidence given before the committee afforded a most disgusting picture of the depravity of the members of the legislature, and indeed, I might say, of the degradation of human nature itself. The attempt to corrupt, and in fact, corruption itself, was not confined to any one party. It extended to individuals of all parties, and it is not improbable that the interests of members in these applications for moneyed incorporations had an effect on the political action of some of them."—Hammond, II, 178.

financed to bank charters. Other forms of corruption were quite as rife. The legislature of the State was regarded as the fit tool of all wishing to secure special privileges, franchises or properties through the favorable act of government. After the establishment of independence the salaries and privileges of office were almost at once cast into the general pool of spoils and the political activities were prostituted to the most ignoble ends.

The first governorship of the State after the adoption of the Federal constitution, was actually stolen. There had been a close contest between Jay and Clinton.

As the votes in the eastern and southern counties were announced one by one the majority for Clinton dwindled till it stood one hundred and eight, with two strong Jay counties to be heard from. If Clinton was not to be defeated, it was clear that an excuse must be found for throwing out the returns of some Federalist county, and, happily for the Republicans, an opportunity to do so existed. The box from Tioga county, which contained a good majority for Jay, had been given by the sheriff to his deputy to carry to Albany. But the deputy fell sick by the way and sent the box on by a sub-deputy of his own appointment. This the Clintonians decided was illegal and insisted that the vote of Tioga should not be counted. But even with Tioga left out, Jay would have a majority if Otsego was counted. Now, in Otsego, the sheriff had been appointed in February, 1791, to serve one year and just before the close of his first term had written to the council of appointment declining a second. One month after the end of his year a successor was appointed, but had not qualified or acted when the election took place. In this state of things the old sheriff continued to act, and, gathering up the ballots cast in the towns of his county, sent them by his deputy to Albany. Scarcely had he done this when he found that the ballots of one town had been left out, and these he sent wrapped up in paper. The Clintonians, availing themselves of these irregularities, insisted that the returns of Otsego should not be counted. There was, in the first place, no sheriff. In the second place, the law required

that the vote of every town should go in the box; but, as one had not gone into it, all the others must be lost. To this the Federalists made an elaborate answer, and supported their reasoning by the published opinion of eight of the most distinguished lawyers then practicing in New York city. The votes, after being received by the Secretary of State, were to be canvassed by a joint committee of six members of the senate and six members of the assembly. As some were Federalists and some were Republicans, they naturally differed as to receiving and canvassing the votes of Otsego and Tioga, and after many stormy sessions, agreed to refer the whole matter to a commission consisting of the United States Senators from New York, Rufus King and Aaron Burr. Colonel Burr, knowing that the Clintonians had a majority of the canvassing board, proposed to give no opinion. But when King declared that he should advise the canvassers to count the votes of Tioga and Otsego, Burr immediately advised them not to do so. Thus, left to themselves, the majority rejected the returns from the two counties as irregular and declared Clinton governor.<sup>13</sup>

That the spoils system of appointment was thoroughly established in New York during the first administration appears from the fact that, as each party in turn succeeded in getting control of the council of appointments, this agency was used for strictly party ends. There were no elective officers except the Governor, Lieutenant Governor, State Treasurer, members of the legislature and Congressmen, and the numbers of appointments were many. This furnished a great inducement for the organization of a machine, and the legislature, with the council, was subverted to this end. At the next election after the stealing of the governorship popular sentiment revolted against Clinton, and a legislature was elected which chose a council of their own faith. Then came a clash between the governor and council which resulted in a usurpation of powers on the part of the

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<sup>13</sup> MacMaster, *With the Fathers*, p 77.

council. The constitution provided that the governor shall "with the advice and consent of the said council appoint all the said officers."<sup>14</sup> The council took the ground that they could nominate and by majority vote appoint the officers. The constitution having been construed in this way, the legislature came to be the source of the appointing power and completely overrode every wish of the Governor.<sup>15</sup> Finally, in 1801, the Republicans having gained complete control, they called a constitutional convention and so amended the constitution as to legalize the former constitutional construction, and firmly established the spoils system of appointment in the State.<sup>16</sup>

The first election of United States Senators was involved in a bitter contest and, in the first presidential election, New York had no voice on account of a hopeless deadlock.

As the party manager came to be more skilled in his profession the gerrymander was introduced. After the census of 1810, a new apportionment being necessary, the opportunity was seized to redistrict the State in such a manner as would have done honor to the most artful political trickster of to-day. A part of New York city was attached to Long Island and various other changes made to guarantee Republican success.

The political practices of New York have been detailed somewhat at length to the purpose of thoroughly disabusing the mind of the notion that our people, in co-

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<sup>14</sup> Cons., 1777, Art. xxii.

<sup>15</sup> This not only happened with Clinton, but also with Jay after he became Governor, his political opponents having obtained possession of the legislature.

<sup>16</sup> Thus, says MacMaster, was the spoils system introduced into New York, and from that day a change in the political complexion of the council of appointments was sure to be followed by a proscription of office-holders.



lonial times and the early National period, were either more lofty in their ideals or more honorable in their practices than the men of to-day. That they were animated by the same desires and were as thoroughly alive to every means of satisfying these desires appears not only by the history of New York, but also that of other colonies and States. "In Massachusetts," said Elbridge Gerry in the constitutional convention of 1787,<sup>17</sup> "the worst men get into the legislature. Several members of that body have lately been convicted of infamous crimes. Men of indigence, ignorance and baseness spare no pains, however dirty, to carry their point against men who are superior to the artifices practiced." John Adams declared the elections of the State to be "unwarranted and indecent." That the legislature was used for the ends of private gain appears from the history of the first banking institutions and the other special privileges granted.<sup>18</sup> It is to Massachusetts that we look for the introduction of that piece of the party machinery which has degraded our legislature and annoyed our people for nearly a century—the gerrymander.

In Connecticut we find an oligarchy established early in its career, which by the law of 1801 restricting the ballot to certain official nominees was sustained till the constitutional convention in 1818.

No State in the Union had been more thoroughly steeped in political spoils and the methods of the ward politician than Rhode Island prior to Dorr's rebellion.

Pennsylvania, having within its border the largest city of the western world as a center for political organization, was thoroughly alive to the wiles of the campaigner. There the very act of adopting the National constitution was so shaded with corrupt practice as to rob it of all

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<sup>17</sup> Journal of Cons. Conv., Chicago Ed., 1895, p. 115.

<sup>18</sup> See *White, Money and Banking* (Ed. 1896), pp. 318-319.

claim to the primitive purity so often ascribed. The party opposing the adoption of the constitution at the time that the legislature had before it the calling of a ratifying convention attempted to defeat the act by absenting themselves and preventing a quorum. This they succeeded in doing until the enraged people "hearing that there was no quorum, went to the tavern, seized two of the absentees, dragged them to the State House, thrust them into the assembly chamber and blocked the doors." This completed a quorum and a convention was called.<sup>19</sup> But when the convention met, it appearing that the published reports would produce an effect opposed to the success of one party, we find that one reporter was bribed to print only such portion as was suited to their ends and the only other who had been allowed to take minutes of the proceedings was silenced by the purchase of his newspaper and notes.<sup>20</sup>

When motives of personal and party advantage entered so largely into the activities of State politics, it is not to be supposed that the National government would be free from domination of the same kind. As in the States, these practices appear in two classes, viz.: Those which were directed toward securing possession of the offices and salaries, and those which were directed toward some advantage to be gained through the exercise of the governmental functions.

As to the first form of activity, it may be said that during the early National period there was no broad National organization devoted to the business of campaigning, as there is at the present time. The divisions among the people were on questions of policy arising under the constitution and the contests were most bitter. This political enthusiasm and intolerance and the desire

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<sup>19</sup> McMaster, The Depravity of the Fathers.

<sup>20</sup> McMaster, The Depravity of the Fathers.

of each party to win led to extra legal party organizations; these party organizations were used as instruments by those seeking office for office's sake and the emoluments attached thereto. Mr. Hammond, commenting on the political situation of 1789, says:

After the adoption of the Federal constitution and the organization of a National government in pursuance of it, and the unanimous election of Gen. Washington for the first President, all disputes about the principles contained in the constitution seemed for a moment to subside. \* \* \* But, notwithstanding the apparent general acquiescence, the parties which had been formed in the State of New York on the question of adopting the United States constitution still continued to exist, although the cause for political association had ceased. The patronage of the National government through the influence of Gen. Hamilton, Mr. Jay and Mr. Schuyler, with the President, was generally bestowed upon men either personally or politically hostile to Gov. Clinton; and Gen. Hamilton, it will be found, always spoke of him unfavorably. Accordingly, John Jay was appointed Chief Justice of the United States, James Duane judge of the district of New York, Richard Hanson United States attorney and William S. Smith marshal, all active and zealous opponents of Gov. Clinton. Gen. Hamilton himself, who was at the head of the opposition to the Clinton party and was indeed the life and soul of the opposition, was made Secretary of the Treasury of the United States. Although these gentlemen were all of them eminently fitted for the offices to which they were respectively appointed, yet while such men as Melancton Smith, Judge Yates, etc., etc., were to be found among the friends of Gov. Clinton, it is not to be presumed that this exclusive selection of his opponents as the recipients of the bounty of the United States government would have been made in the entire absence of party views. There seems to me good reason for believing that the designs of Gen. Hamilton and his Federal friends in this State, who had the ear of Washington, was so to use the National patronage as to curtail the influence of Gov. Clinton and finally prostrate both him and his party.

In the other States a like condition existed. Mr. Grayson writing to Patrick Henry, June 12, 1798, painted the situation at the National capitol as follows:

There are an infinity of people here waiting for office. Many of them have gone home for want of money. It is certain a hundredth part cannot be gratified with places; of course ninety-nine will be dissatisfied.<sup>21</sup>

There were only a few so partisan as to ascribe partisan or selfish motives to Gen. Washington; yet the party lines being sharply drawn in the States and the men on whom Washington leaned most strongly being Federalists, it so happened that by far the greater proportion of his appointees were of that party.<sup>22</sup>

John Adams came into power a confessed partisan. He had condemned Washington for his liberality toward the Republicans. He had lived in a State where those who were now allied with the Republicans had recently been in armed opposition to the government; he distrusted the Republicans and believed that a successful establishment and maintenance of National government depended not only on the directive heads of the departments of government being Federalists, but also all those who were subordinate to them. Adams made the great

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<sup>21</sup> Letters and Times of the Tylers, Vol. I, p. 168. Something of the methods employed at the national capitals may also appear from the letters from John Adams to James Lovell, Sept. 1, 1789, an extract from which is as follows: "The place of collector would undoubtedly have been yours if the President could have found any situation for your friend Lincoln. It was from no lukewarmness to you I am certain, but the public cause demanded that Lincoln should be supported, and this could not be done any other way. If after some time any other permanent place should be found for him, you, I presume, will come in collector."

<sup>22</sup> Mr. Lyon Gardner Tyler, President of William and Mary College, assures us that the most important offices in Virginia and all of the states south of the Potomac were filled with Federalists to the exclusion of Republicans. See "Parties and Patronage," pp. 14, 15, 18.

mistake of thinking that his own party was the only one to be trusted, of forgetting that over and above each party sat in judgment the people; that neither party could violate the popular sense of political propriety and political justice without having popular support withdrawn.<sup>23</sup>

Acting upon the hypothesis that Federalists were the only ones fit to rule, Adams studiously pursued the policy of filling all offices with men from that party. He made a number of removals for political reasons, but comparatively few were necessary, as most of the offices were already filled with Federalists at the time he became President. There were, however, a large number of new appointments to be made. The foreign complications and the Indian disturbances demanded the reorganization of the military forces. New measures for revenue and administration called for an extension of the civil service. In making these he adhered strictly to party lines; even in the military he thought it unsafe to trust his opponents.<sup>24</sup> In the same spirit of restraint of all acts and

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<sup>23</sup> This is a mistake that has been made many times since. It was made by many of the Republican party immediately after the civil war. It is made today by many who suppose that the success of the opposition party would carry with it ruinous results in government. Not long since in discussing the question of whether we should declare war against Spain, one of the leading newspapers of the country asserted that, while war was to be deprecated, a halting policy would mean Democratic success, and war would be preferable to this. Such notions presume that the American people have not enough of "governing sense" to maintain good government; that, left to themselves, they would run to ruinous extremes; that they must have their attention diverted and in a measure be deceived in order that the best results may be accomplished. If this hypothesis is true then we should adopt a monarchical form of government at once. Experience has shown, however, that the people, when appealed to for a judgment, have always been conservative. We are constantly referring to them more of the questions demanding conservative action.

<sup>24</sup> This was a matter of serious complaint. No assumption more foreign to democratic government could be made than that those citizens who did not participate in the election of the President were so much to be doubted that they could not be

expressions on the part of those in opposition to the administration the alien and sedition laws were passed. It was a revolt against such assumptions and practices that caused the people to withdraw their support from the Federal party and turn it to the Republicans, led by Thomas Jefferson. The attitude of Mr. Adams may be best illustrated by his action after his defeat was made known. Wishing to establish Federal partisans in some branch of government where they could not be removed by his successors, a bill was passed in the last part of the last session of Congress under his administration creating thirty-six new Federal judgeships, which, under the constitution, would hold "during good behavior." Adams then proceeded to appoint Federalists to these offices. He also appointed John Marshall, then Secretary of State, Chief Justice of the Supreme Court. These appointments having been made, it became necessary to have the commissions issued before the administration went out, and all forces were set to work, laboring till the hour of midnight when Jefferson's appointees walked into Marshall's office and demanded possession.<sup>25</sup>

Mr. Jefferson came into power at the head of a movement for reform. The alien and sedition laws had been most odious, as they put into the hands of the administrative department of government the power to throttle expression of opinion adverse to those in control and prevent the moulding of popular sentiment. The partisanism of Adams was bitterly denounced. The military and civil machine built up as a basis of patronage was decried as being fitted only to a monarchy. In response

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trusted in the service of the army. That this attitude was most offensive to the Republicans, see "Debate and Resolutions of Virginia and Kentucky," p. 205.

<sup>25</sup> In addition to these judicial positions, Adams also appointed justices for the District of Columbia and a number of high federal officers other than those mentioned prior to Mr. Jefferson's induction into the office of President.

to popular outcry the alien and sedition laws were repealed. As to civil service, Mr. Jefferson took the stand that those appointments made by Mr. Adams just prior to his quitting the office should be ignored. He procured the repeal of the law creating the new Federal court under which the judges had been appointed. The army, consisting of more than 100,000 men, he disbanded, leaving only four regiments of infantry, two of artillery and two troops of light dragoons. The number of civil servants was reduced; about three-fourths of all in the service of the United States were dismissed. As to removals, several were made for cause of incompetency, but others were made for political reasons, as Mr. Jefferson held that, whereas, the offices had been filled entirely by Federalists in the former administration and there being very few of the Republican faith in the service, the officers and representatives of the people in the government should be proportional to the strength of the parties.<sup>26</sup> During the eight years of his reign only about one hundred removals were made, except those made by abolishing the office, and, though appointments were made from his own partisans, the civil service had a large representation of Federalists. During the administrations following only five removals were made by Madison in eight years and thirteen by Monroe during a like period. These were made largely for proper causes.

After the war of 1812 the Federalist party became completely emasculated. The people were almost a unit in support of the administration which had so bravely defended National and citizen rights. But during the war an increase in the military and civil service became necessary. The patronage of the government was consequently enlarged. This helped to harmonize the various

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<sup>26</sup> This is the principle of proportional representation, though the method employed was not well adapted to securing it.

elements; an era of good feeling was established and all went well till 1824, when in the presidential election four candidates came out for President on practically the same ticket. The vote being divided so that none received a constitutional majority, the election was thrown into the House of Representatives. General Jackson, who had received a plurality of the votes of the electoral college, was defeated and Mr. John Quincy Adams was elected President. This fact incensed the defeated general and with all of the energy which he was accustomed to display on occasions of military activity he set about to organize an army of political conquest, to plan a campaign for victory in 1828. It was under the leadership of Jackson that the various partisan elements which had become so well established in the States were brought together into a National organization having for its object the success of its members in securing the benefits of office and official patronage. "Give me an army of thieves," said a commander of antiquity, "for the storming of a city." Jackson recognized the force of appeal to the same motive in the organization of his campaign for the Presidency. Not the plunder of a city, but the salaries and patronage of office was what he held out to those who gathered to his standards.

From this time we may date the organization and maintenance of National parties on a "spoils" basis—National predatory groups. Thereafter the work of "campaigning" became the subject of military genius in so far as the party managers were concerned and the "professional politician" was a person largely sought after as a means of successfully carrying on political expeditions. The official representative of the people became the choice and tool of the political "machine"—an organization formed for the purpose of bringing together all of the widely distributed interests and parts into one organic whole in the interest of party success



and the control of the offices and functions of government. Political patronage, spoils, became the desideratum. So powerful did these "machines" and rings become by reason of their wide and masterful organization that the people came to feel their own impotence beside.

The investigation of defalcations by the twenty-fifth Congress, 1839, shows that assessments on officers for political purposes were common. The testimony of Swartout, a defaulting deputy collector at New York city, is to the effect that he was frequently called on to contribute to "political objects" while he was deputy collector; that the amounts called for were from \$20 to \$100; that the tax was pro rata from 1 to 6 per cent of the salary of office; that the assessments were made by a general committee of the Tammany society. If the officer neglected or refused to contribute the amount assessed against him in this manner he was summarily dropped and his career came to an end. From all of the evidence at hand we may suppose that "political methods" were well developed before the middle of the century.

As to the second form of political activity, by which the general welfare is made subordinate to personal ends, viz., that directed toward some advantage to be gained through the exercise of functions of government, several circumstances had conspired to introduce this into the Federal government. We have already mentioned similar forms of activity in the States during the early National periods. It might be mentioned further that during the revolutionary war and immediately subsequent thereto many of the people had been enriched by act of government in confiscation of the lands and properties of British subjects and sympathizers. Another form of using the agencies of government to enrich certain members of society was the confiscation of property by the forced circulation of worthless paper money and by mak-

ing this legal tender for debts. The paper money craze had thoroughly debauched the public mind in several of the States. In Rhode Island, for example, the wildest excesses were indulged.<sup>27</sup> Speculation and gambling received encouragement, while honest effort and productive labor was discouraged by such acts. The predatory instincts of the people were stimulated to a high pitch. With such training as this and with the practice of securing special advantages through legislation and other acts of government, well established in the States, it is to be expected that the National government would be sought as a means to the same end.

An instance of this kind is to be found in the speculations among the members of the first Congress by which they took advantage of enactments to strengthen the public credit, pay the debts of the Confederation, and assume the obligations of the several States to further their own pecuniary interests. Jefferson, speaking of this, says:<sup>28</sup>

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<sup>27</sup> There was a party in this State which held to the doctrine that the fiat of the government was all that was necessary to give value to a medium of exchange and make it pass current. The State credit was almost nil and the issue of paper made passed in the market for only a few cents on the dollar. In order to sustain this paper and enforce the doctrines of this the dominant party, the General Assembly of the State enacted that the paper should pass at its full face value and that any one who should refuse to receive the bills on the same terms as specie or who discouraged the circulation by refusing to trade when the market price was offered for goods would be liable to a penalty of one hundred pounds and the loss of the right of a freeman. This amounted to the confiscation of property as, the actual value being small, the holder of a piece of paper would be able to get several times the value in goods. The supreme courts on two occasions refused to enforce the penalty, holding the law to be in violation of the constitution, the taking of property without due process. The triumphant party in the general assembly then proceeded to procure judicial sanction for their acts by removing four of the five judges and constructing a court that would render a favorable decision. See Arnold, II, pp. 520-36.

<sup>28</sup> Jefferson Works, IX, p. 91-4.

Even in this, the birth of our government, some members were found sordid enough to bend their duty to their interests and to look after personal rather than public good. It is well known that during the war the greatest difficulty we encountered was the want of money or means to pay our soldiers who fought, or our farmers, manufacturers and merchants who furnished the necessary supplies of food and clothing for them. After the expedient of paper money had exhausted itself, certificates of debt were given to individual creditors with the assurance of payment so soon as the United States should be able. But the distress of these people often obliged them to part with these for the half, the fifth, and even a tenth of their value; and speculators had made a trade of cozening them from the holders by the most fraudulent practices and by persuasions that they never would be paid. In the bill for funding and paying these, Hamilton made no difference between the original holders and the fraudulent purchasers of the paper. Great and just repugnance arose at putting these two classes of creditors on the same footing, and great exertions were used to pay the former in full and the latter the price only which they had paid, with interest. But this would have prevented the game which was to be played and for which the minds of greedy members were already tutored and prepared. When the test of strength on these several efforts had indicated the form in which the bill would finally pass, this being known within the doors sooner than without, and especially than to those who were in distant parts of the Union, the base scramble began. Couriers and relay horses by land and swift-sailing pilot boats by sea were flying in all directions. Active partners and agents were associated and employed in every State, town and country neighborhood, and this paper was bought up at five shillings and even as low as two shillings on the pound, before the holder knew that Congress had already provided for its redemption at par. Immense sums were filched from the poor and ignorant and fortunes accumulated by those who themselves had been poor enough before. Men thus enriched by the dexterity of a leader would follow, of course, the chief who was leading them to fortune, and became the zealous instrument of all his enterprises.

\* \* \* This game was over and another was on the carpet at the moment of my arrival, and to this I was most ignorantly and innocently made to hold the candle. This fiscal maneuver is well known by the name of the Assumption. Independently of debts of Congress, the States had during the war contracted separate and heavy debts. \* \* \* This money, whether wisely or foolishly spent, was pretended to have been spent for general purposes and ought, therefore, to be paid from the general purse. But it was objected that nobody knew what these debts were, what their amount, or what their proofs. No matter, we will guess them to be twenty millions. But of these twenty millions we do not know how much is to be reimbursed to one State or how much to another. No matter, we will guess. And so another scramble was set on foot among the several States and some got much, some little, some nothing. But the main object was obtained. Assumption was passed and thrown in as pabulum to the stock-jobbing herd.

The speaker of the House of Representatives was one of the largest speculators in paper certificates affected by these acts. The speaker of 1796 used his offices to secure the passage of an act in which he himself was interested. A large number of the members were similarly situated and yet they did not refuse to vote and act on this account, but rather redoubled their efforts to secure laws to their own interest.<sup>29</sup>

After the war of 1812 the energies of the nation were employed in the development of the natural resources of the country. National roads were built far into the interior, canals were projected; the tariff was adjusted on a basis of giving the largest encouragement to "infant

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<sup>29</sup> Mr. Jefferson again writes that "of all the mischiefs objected to the system of measures before mentioned none are so affecting and fatal to every honest hope as the corruption of the legislature." *Jeff. Works*, III, p. 362. Again he writes, "I am averse to giving contracts of any kind to members of the legislature. *Ibid.*, V, p. 50.

industries." Besides, the Napoleonic wars had been settled and the productive energies of Europe were turned toward industrial employment. The security offered to capital by universal peace encouraged it to reach out for the larger profits offered by the western continent. There was a general movement to the west. The government of the United States, holding vast territories of the most fertile agricultural lands, by its laws, offered these free as an inducement to permanent settlement and improvement. The same liberality was shown as to the mineral and timber resources. All these circumstances tended to produce an era of new undertaking and speculation as to the future of the West. These inducements to private speculation and the further fact of there being only one political party, tended to lessen the vigil of the people over the affairs of the government. Every one was seeking his own fortune and the government was regarded as an important instrument for the attainment of personal ends. As it was hard to obtain a sufficient amount of money to prosecute the speculative enterprises of those who lived in the newly settled regions, another banking and paper, or "wild-cat," money craze swept over the country. The public lands were used as a stake for the wildest gambles. The administrative and legislative officers were implicated in large schemes for profit and very usually the public funds in their hands were used as a base of operations.<sup>30</sup> The members of the administration were not averse to making contracts with the government. The credit of the States was obtained for private ends; loans were made and immense government enterprises were pushed as a means of se-

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<sup>30</sup> With the collapse of each speculative wave, as in 1826 and 1837, these officers became defaulters. Nearly all of the land agents at one time were in default. It was just subsequent to one of these periods of defalcation and general collapse (1841) that Mr. Tyler proposed that the merit system of appointments be adopted by the federal government.

curing lucrative contracts. In the new States the location of county seats, seats of State government and other public institutions were the subject of sharp rivalry and official connivance. The sale of school lands, grants to railways, the taking of capital stocks in private concerns and matters of appropriations by special legislation became matters of abuse. Changes in county lines, the annexation of territory, the formation of new counties, the apportionment of representatives, the changing of the lines and the creation of new judicial districts became matters of political jugglery.

As the people, led by Jefferson, had revolted against the excesses of government subsequent to the revolutionary war, during the reign of the Federalists, so now they withdrew their support from the Democrats (Republicans). The new Whig party was the party of reform. The continued excesses under Jackson and Van Buren turned the support of the people to Harrison and Tyler, whose candidacy stood for opposition to spoils and ~~executive misrule~~ and in the interest of Jeffersonian simplicity and economy. The log cabin, the coonskin, the ~~gourd and cider cask~~ were the symbols of their faith which operated like magic to draw the people to their support. Harrison received 264 electoral votes, while his opponent received only 60. Though the Mexican war added materially to the capital of the spoils organization, the pressure brought to bear on the government was such that prior to the civil war very much had been accomplished in the way of provisions for safe and economic administration.

The civil war, however, introduced into our history another period of spoliation. This was a period of broadening productive co-operation; the middle West had accumulated a large capital; the commercial interests of the country were becoming great, the accession of Mexican territory gave a new field for expansion; the dis-

covery and production of gold in California set the tide of population across the continent and gave to the people a large supply of that commodity most readily convertible into capital adapted to any productive process desirable. Organizations for the building of trans-continental railways and other projects of a magnitude theretofore scarcely more than dreamed of were the order of the day.

This broader co-operation found its most advantageous form of organization in the private corporation. The advantages of this form of co-operation, however, depended largely on the privileges and grants obtained from the government. It was to their interest to have general laws favorable to the centralization of capital; it was also much to the advantage of the co-operating ones for any particular purpose to procure certain grants and privileges which would place them on a plane of especial advantage in the management of their concerns. During the early National period much had been done by way of taking away from the legislative and administrative departments of government the power of granting special privileges to private corporations, but the quasi-public corporation, the company which sought to obtain control over franchises of way and transportation was still free to appeal to these agencies. The sudden prospects of profit that opened up before them and the aggregations of capital that were brought together in these corporations gave to the projectors both the inducement and the means of securing public properties and the use of public credit, as well as special concessions and franchises. After the middle of the century the predatory activities of the quasi-public corporation form a large part of our economic and political history. Though by broader organization they have done much to advance the economic interests of society, by reason of their efforts to secure greater advantage through acts of gov-

ernment, these organizations have been the principal force against which the people have had to contend. They have been conditions present calling for modifications in our institutions in the interest of the general welfare.

Added to the fact of the broadening co-operation of the time was the circumstance of war; a war in which two sections of the nation were straining every resource to reduce the other to subservience, the one seeking to maintain the broad political organization of the Federal government, the other seeking to protect the sovereignty of the States. The merit system of civil service had not then been established; this was still on a "spoils" basis. The party which supported the Federal government was omnipotent in its control; there was no strong opposition to hold it in check. It became necessary to expend the public service as a means of carrying on the war and supply the armies in the field. Conditions were therefore ripe for spoliation on an elaborate scale as soon as the arms of the North had asserted themselves with such force as to vouchsafe the integrity of the nation. On the one hand were the large corporations seeking special grants and privileges of advantage for profit; on the other were the forces organized to despoil the treasury through salaries and official patronage. With only one party in favor and with many opportunities offered for private gain through the control of the patronage, the patriotic impulses of the people were enlisted in support of an organized predatory group which used every act and deceit to retain the sanction by which they and their friends were being enriched. The excesses and abuses which followed the civil war form the most shameless part of our history. The manner in which the spoils system operated upon the expenditure of government appears from the report of the Secretary of the Treasury. This shows that in 1848, immediately after the Mexican war, the expenditures, outside of the amounts paid out



on account of the National debt, interest, premiums, pensions, Indians, war and navy, were \$5,650,000; that immediately following (1849) the expenditures of the same kind amounted to \$12,885,000; that in 1854 they reached \$26,672,000, remaining about the same till 1864, when the fate of the nation was practically decided, the expenditure of the same nature (i. e., practically the cost of the civil service) began to rise, in 1865 being \$42,989,000; in 1867, \$51,110,000; in 1869, \$56,474,000, and in 1874 \$85,141,800. The year 1849 marks the beginning of a period of National expansion and a necessary increased expense for the carrying on of the ordinary functions and for surveying, National improvement, etc. After 1854 was reached the government was carried on for ten years, the last three covering the most desperate part of the civil struggle, with scarcely any increase. After the destiny of the National government was settled then began a systematic plundering of the public treasury through official leechery. Any attempt to portray the condition would fall far short of the truth. In 1876 an issue was made of the practices of the dominant party and defeat was avoided only by a partisan electoral commission. The party of the opposition became so strong as to compel retrenchment, yet in 1883, when at last a commission was appointed to investigate, a deplorable condition of affairs was found. The following is taken from the fourth annual report of the civil service commission, p. 121, et seq:

Before the enactment of the civil service act the condition of the executive civil service in the departments at Washington and in the customs and postal services was deplorable. In the department of the treasury 3,400 persons were at one time employed, less than 1,600 of them under authority of law. Of these 3,400 employees 1,700 were put on and off the pay rolls at the pleasure of the Secretary, who paid them out of the funds that had

not by law been appropriated for the payment of such employees. At that time of a force of 958 persons employed in the bureau of engraving and printing 539, with annual salaries amounting to \$390,000, were, upon an investigation of the bureau, found to be superfluous. For years the force in some branches of that bureau had been twice, and even three times, as great as the work required. In one division there was a sort of platform built underneath the iron roof to accommodate superfluous employees. In another division twenty messengers were employed to do the work of one. The committee that made this investigation reported that "patronage," what is known as the "spoils system," was responsible for this condition and declared that this system had cost the people millions of dollars in that branch of the service alone. So great was the importunity for place under the old system of appointments that when \$1,600 and \$1,800 places became vacant the salaries thereof would be allowed to lapse, to accumulate, so that the accumulations might be divided among the applicants for place on whose behalf patronage mongers were incessant in importunity. In place of one \$1,800 clerk three would be employed at \$600 each; would be employed according to the peculiarly expressive language of the patronage purveyors, "on the lapse." "In one case," said a person of reliability and of accurate information, testifying before the Senate committee on civil service reform and retrenchment, "thirty-five persons were put on the 'lapse fund' of the Treasurer's office for eight days at the end of a fiscal year, to sop up some money which was in danger of being saved and returned to the treasury." Unnecessary employees abounded in every department, in every customs office and in almost every postoffice. Dismissals were made for no other purpose than to supply with places the proteges of importunate solicitors for spoils. One collector at the port of New York removed on the average one of his employees every third day to make a vacancy to be filled by some member of the same party who had "worked to a purpose," not against the common political enemy, but for his patron, who had succeeded in being appointed over some other member of his own party. Another collector at that port, the successor of the one referred to, removed 830 of his 903

subordinates at the average rate of three in every four days. \* \* \* In its first report the commission said: It was the expectation of such spoils, which gave each candidate for collector the party strength that secured his confirmation. Thus, during a period of five years in succession, collectors, all belonging to one party, for the purpose of patronage, made removals at a single office of members of their own party more frequently than at the rate of one every day. In 1,565 secular days 1,678 such removals were made.

A condition of affairs as deplorable existed in the postal service.

On all sides, in every branch of the civil service, subordinate places were used in the interest of the leaders of the factions of the party, who, by assessments, which were disguised in the form of solicitations for money, suggestions that money ought to be contributed, and other methods of this kind, extorted from the public employees funds which were used for political purposes, legitimate or otherwise. Even members of Congress of National reputation signed circular letters addressed to subordinate civil servants of the government requesting contributions to be paid to them, as members of a political committee; doing this in utter disregard of the spirit of a provision of the Revised Statutes declaring it to be unlawful, an offense punishable by fine and dismissal from office, for any officer in the public service to solicit or receive money from any other officer in such service! The public conscience had been perverted by the doctrine that to the victors belong the spoils; and the people were not shocked when they beheld public offices bestowed as a reward for partisan services upon persons at once unworthy and incompetent. Senator Hoar, in his speech on the Belknap impeachment trial, forcefully stated the condition of the public mind at that time when he said:

"I have heard in highest places the shameless doctrine avowed by men grown old in office that the true way by which power should be gained in this Republic is to bribe the people with the offices created for their service, and the true end for which it should be used when gained is the promotion of selfish ambition and the gratification of personal revenge."

Not only were the salaries of office made a means of political plunder, but also every interest which official acts, legislative or administrative, might affect was counted as part of the spoils to which the patronage of the successful candidate or party might apply. The "Whisky Ring" furnishes an example of the use of the revenues of government for the joint purpose of satisfying personal ends and perpetuating the party in control. Says Gen. John McDonald:<sup>31</sup>

The great whisky frauds culminating in 1875 are a part of the history of American politics. No ring was ever before formed embracing such a gigantic scope and including among its instigators and membership such distinguished government officials. The original intention of the organizers, adopting suggestions from the highest authorities in the land was to make the ring coextensive with the nation, with headquarters in the large cities, for the purpose of raising a campaign fund with which to advance the interests of President Grant in his aspirations for a second term. So far as my personal knowledge extends, the money received from the distillers and refiners was used according to the original intention of the members, until Grant's re-election, when, the purpose of the organization having been accomplished, but with the management of the colossal fraudulent undertaking thoroughly in hand, it was decided to continue the appropriation of the revenue and to make the members of the ring beneficiaries of the fund. During Congressional and municipal campaigns a part of this fund was always used in the interest of the Republican candidates.

The direct thievings of this ring amounted to many millions of dollars. We will not enter into a discussion of the "Credit Mobilier," the "Star Route," the "Tobacco Ring," "the Carpet-bag" administration of the South and other flagrant attempts at the subversion of public uses to private ends and the control of privileges

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<sup>31</sup> The Secrets of the Great Whisky Ring, p. 17.

to be obtained from the government; they are well known to the ordinary American, as are also the more local but not less corrupt combines such as the Tweed Ring, the Philadelphia Gas Ring, etc. The election practices by means of which these combinations obtained and continued their power is well illustrated in the political practices of New York city. At the general election held in that city in November, 1863, the political managers so arranged that no one except those in touch with the management knew where the places for registry were,<sup>32</sup> thus disfranchising a large portion of the voters. At the general election of 1867 the ring, feeling emboldened by their previous success, instructed its followers that they would be protected in any practice that they might employ for the purpose of defeating the opposition. Thousands of illegal registrations were made. The fourth, the sixth, the eighth, the sixteenth and the twenty-first wards were overrun with repeaters. The New York Tribune on the morning of election day published a list of some seven hundred of these names registered in nine different wards, and this, as stated in the same issue, was only a very partial list. In the eighth ward, upon official investigation, more than fifteen hundred were found. Men were brought from the States of New Jersey and Pennsylvania and their votes received and counted. Not only the administrative but also many of the judicial officers were servants of the ring. Assaults, riots and murders were the order of the day.<sup>33</sup> The immense sums derived from political assessments and fraudulent practices, together with the various steals carried on almost openly, gave to the corruptionists a fund which, together with the general organization of the various

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<sup>32</sup> See Election Frauds of New York City, Davenport, p. 49. The same method was employed in the presidential election of 1864.

<sup>33</sup> Ibid., p. 100, et seq.

local and National rings, through National partisan committees, made the spoils organization almost invincible. The government of the Southern States during the Reconstruction period was one of the most shameless parts of the general system of political plunder.

As to the subversion of government in the interest of the quasi-public corporations much might also be said. It cannot be said that the industrial activities of these corporations have been adverse to public interest. Had they not contributed to the service of the communities in which they operated, had they not rendered a service at a less cost than the smaller concerns which were employed in like manner they would not have received sufficient public patronage to have survived. They have done much to advance the industrial processes. The master minds which have worked out and managed our large transportation companies, our telegraph companies, our express companies, etc., have rendered a great service to humanity, but the methods by which many have procured grants and privileges from the government and then, having procured these grants, avoided public control and public burdens as a means of obtaining increased profits or sustaining monopolies are thoroughly reprehensible in themselves and degrading both to society and to government. Instead of securing these grants and privileges by fair dealing with public agents and officers appointed or elected by the people to guard the public interest the advantages in profit to be gained by a slight variance of the terms of a franchise or grant have led them to erect lobbies and bribe public officials until they have come to be regarded as the enemies of the public. One of the first organizations to take an active part in exposing the methods of these corporations was the Anti-Monopoly League of New York, organized by Peter Cooper, F. B. Thurber and others. As expressed by one of its presidents, the main purpose of the

anti-monopoly movement was "to resist public corruption and corporate aggression. Anti-monopolists have no war with honest corporations. These are simply forms of co-operative enterprise; and in co-operative action lies the solution of the disputes between capital and labor." On April 16, 1883, Mr. Thurber delivered an address before a prominent political club of New York city in which he summed up the situation as follows:

The masses do not appreciate how great, many and dangerous have been the attacks made by corporate monopolies upon our free institutions. Time will not permit me to enumerate many of these, but the following undisputed facts are sufficiently startling. It is not disputed that Gould, Vanderbilt, Huntington, Stanford, Sage, Field, etc., twenty years ago were comparatively poor men, and to-day these five men are worth probably \$500,000,000; and, through the corporations they control, wield the power of \$3,000,000,000.

That they control absolutely the legislatures of a majority of the States in the Union; make and unmake Governors, judges, United States Senators and Congressmen, under the forms of popular government, and practically are dictators of the governmental policy of the United States.

That within twenty years nearly two hundred millions of acres of the public lands have been given to corporations, equal to about four acres for every man, woman and child in the United States.

That this wealth and power has been acquired largely through bribery and corruption. Mr. Gould testified in 1873 that he contributed money to control legislation in four States, and it was proven that the Erie road, in a single year under his management, disbursed more than \$1,000,000 for this purpose. His interference with the administration of our courts of justice is illustrated by his telegraphing United States Senator Plumb asking him to support Stanley Matthews for the United States Supreme Court. \* \* \*

That because Senator Thurman was active in compelling the Pacific railroads, in which Mr. Gould was in-

terested, to fulfill their contracts with the government that honest man and able statesman could not return to the United States Senate.

That E. D. Worcester, treasurer of the New York Central Railroad, testified before the late constitutional convention of the State of New York that that railroad paid \$205,000 one year and \$60,000 another year to obtain legislation, and that it was obtained.

That in the United States Senatorial contest last year (1882) in the State of New York a member of the legislature stated that he had been given \$2,000 to vote for a railroad candidate for the United States Senate; that he had given the money to the Speaker and asked for an investigation. An investigation was ordered, and a State Senator and two lobbyists were indicted; but they have not been tried, and it is stated that corporation influence will prevent their trial, or, if tried, secure their acquittal. Even now a bill is pending in our Democratic legislature to cover the bribe into the State treasury, but no Democrat or Republican statesman exerts his influence to have the indicted bribers tried, convicted and punished.

That in 1877 the railroad riots in Pittsburg destroyed a large amount of property. The railroads refused to indemnify shippers, but endeavored to make the people of the State liable to the railroads. They tried to buy a bill through the legislature saddling several millions of dollars upon the public. Their usual method of bribery was employed, but was detected, and E. J. Petroff, a member of the legislature, with several accomplices, were tried and found guilty; but here the political influence was brought to bear, United States Senator Don Cameron leaving his seat in the Senate and going home to look after things, and they were pardoned.

That last winter the railroads of New Jersey united in an effort to secure the entire water front of Jersey City under the specious guise of confirming the boundaries of a map. This infamous bill was such a flagrant disregard of public rights that the Governor, although elected by railroad votes, vetoed it. The Senate again passed it over the veto, but the assembly hesitated and bribery, the usual monopoly weapon in such cases, was resorted to.

An investigation was ordered, and the committee reported that the bribery was fully proven and that John



J. Cromer was the man who did it. He has not yet been tried, and it remains to be seen whether Jersey justice is equal to the task of punishing a corporation briber.

That in March last two members of the Ohio legislature were arrested for bribing others in the interest of a railroad company, and scarcely a State capitol is without the yearly proof that bribery is a common corporate practice.

That the Congressional investigation of the Credit Mobilier swindle showed that \$47,261,000 profit was made by a syndicate of Congressmen and other public men; and it is a well-known fact that many of our public men have become very wealthy without any visible means of doing so.

That Congress is packed with corporation lawyers and other representative interests; measures in the interest of the people are retarded, smothered or throttled, while those in the interest of corporations are consummated without the slightest difficulty.

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That the last Congress not only refused to restore to the public domain the lands which had been forfeited by the Northern Pacific Railroad, but on motion of Congressman Reed, of Maine, gag law was enforced and Congressman Caswell, of Wisconsin, tried to prevent the vote going on record.

That a large portion of the public travel on free passes at the expense of the rest of the community, and a free pass issued by the New York Central Railroad is in the possession of the Anti-Monopoly League which specifies that it was issued on account of the Supreme Court.

That a committee of the New York legislature, Hon. A. B. Hepburn, chairman, after investigating the management of railroads in that State used the following language: "The abuses in railway management exist so glaring in their proportions as to savor of fiction rather than actual history."

That to perpetuate these abuses the perpetrators thereof are now seeking to control the thought of the nation. Leading journals are purchased with ill-gotten gains and the ablest editors in the country are engaged to preach "peace on earth and good will to men" in one

column, while misleading innocent investors and vilifying patriotic citizens in the others.

These are undisputed and indisputable facts, and only a few of the many straws showing which way the wind blows.

While some of the claims made by Mr. Thurber in his statement of conditions may by some be branded as partisan, yet the foregoing statement of facts may be taken as fairly illustrative of the practices of the time. The forces of corruption, which surround legislatures and other agencies of government, serviceable to the quasi-public corporation, are many, and much of the wealth acquired by the promoters of these enterprises is as clearly the result of predation as were the acquisitions of William the Conqueror or of the Tweed ring of New York.

The private corporation has also found conditions favorable to the employment of governmental agencies for private ends in the tariff laws and the various appropriations made by the general government as a means to patronage and spoils.

A very large proportion of the people have been content to pursue their chosen industry and leave to others the business of carrying on the functions of government. As long as such an order of things is maintained that they are able to conduct their business with profit they have little regard for the methods employed. It is only when those in control subvert the functions of government, neglect the public welfare and prostitute the machinery of State in such a manner that the people begin to feel the effects of misrule, that they at last become aroused to political activity of sufficient force to overthrow the organized despoilers of the public purse and betrayers of public confidence. Here again we find a manifestation of the polity of conquest; a predatory group in control organized for plunder, adverse to the principles of government for the governed. Their or-

ganization is quite similar to that of an army of invasion; their tactics in strategy and deception quite equal to those of an Alexander or a Napoleon. But the instruments by which they seek to rise to power and gain control of the government are quite different from those employed by the more ancient conquerors. The modern State had demonstrated its ability to cope with armed force, when directed against the industrial welfare. Not armed force, but "patronage" is the instrument with which the modern predatory group accomplishes its ends.

"Patronage" for the purposes of the spoilsmen is a masterly device. It brings into their ranks the very forces that in case of open warfare would be arrayed against them. It has survived military force for the reason that it appeals to the economic interests of the industrial members of the State. The entrepreneur, the captain of industry, recognizing in the corporation a form of industrial organization especially advantageous to the successful conduct of widely extended enterprise requiring the instruments of large capital, seeks from the government a favorable charter. More than that, he would have such sovereign privileges and grants of monopoly as would give him advantage in his undertaking over his competitors. How are these to be obtained? By patronage. It is not the general welfare that now appeals to him, but patronage; this being held out as a means whereby he may obtain ends that are so desirable, he at once becomes an ardent supporter of a "party," through which he hopes to obtain the privileges desired.

The location of seats of State government were made matters of political speculation, the subject of patronage. Certain property holders, wishing to have the value of their holdings advance by this means, conspired with officials and sought the patronage of parties that their fortunes might be enhanced. The disposition of school lands gave to the party organization certain patronage

which could be dispensed with effect and profit. The location of State buildings furnished political capital. Franchises for railways and canals, with special privileges, were especially desirable, and these might be procured through patronage. The borrowing of money in the name of the State furnished one of the most fruitful sources of power. The employment of the "gerrymander" in the interests of party candidates and spoilsmen, the appointment of representatives, the creation of new judicial districts to make room for placemen, the arbitrary changing of county lines and removal of county seats, the incurring of enormous debts in local political subdivisions in the interests of contractors and other party beneficiaries, the subscription to stock of corporations by public officials are some of the many means of obtaining and of distributing this patronage that has become so powerful in sustaining the party organization.

When these abuses have become too great to be borne by the public at large; when they have been chafed and galled and had their will thwarted till they are incited to rise up and assert their own political power, the spoils organization has been overthrown for a time, but the opportunity furnished by our representative system for the spoilsman and the corruptionist to subvert the government has demonstrated to the American people the necessity for institutional change. How can we protect ourselves from the machinations and insidious designs of "politicians" and spoilsmen? How can we break the power of the predatory organization? These are the questions that the people have been asking themselves, and during the last century have attempted to answer, in the modification of their institutions. By experience they have found that the only way of permanently breaking the power of the predatory group and of protecting themselves against its design is by taking away the means and removing the inducements for spoliation.

Take away the spoils and the whole predatory activity ceases. Modify institutions in such a manner that they cannot be employed as instruments of private gain and as a basis of predatory organization. When we have accomplished this the chief motive to participation in affairs of State will be that of promoting the general welfare—the prime purpose of modern representative government. Remove the system of spoils and official patronage and the whole organization of a predatory nature will fall. Political parties, divisions among the people on questions of public policy will continue, but on a new basis, a new principle of organization—that of the welfare of the State. Then will we have achieved the aim both of party and of popular government.

Let us consider the modifications of government in the United States from this standpoint and note what, if any, progress has been made; what our present status from an evolutionary point of view.

## CHAPTER XII.

MODIFICATIONS OF LAW AS A RESULT OF POPULAR CO-OPERATION IN GOVERNMENT—(1)  
RELATIVE TO ELECTION AND APPOINTMENT.

When public men decry our institutions and pessimism claims so large a part in our political philosophy, when from pulpit, platform and press we are told of the decadence of public virtue and of the increasing prevalence of public vice, it becomes us as citizens to look out over the political field, establish our points of comparison and determine if possible in what direction we as a nation are drifting—whether our institutions have proved a failure, whether they are hopelessly involved in conditions of national decay and degradation or whether, on the other hand, we are gradually evolving a government that will conserve those great interests of society which are held up to us as the supreme ideals of political activity.

In the preceding chapters we have traced the growth of democracy in the United States, have shown the rapid development of provisions for popular co-operation in government. Have the results been good or bad? Are we progressing or retrogressing? Having made these provisions for popular activity, are we so modifying our institutions in response to popular will as to adapt them to the attainment of the highest ends of the State, or is the State itself being gradually prostituted to the ignoble ends of the organized despoilers of society? These are questions that confront us. In attempting to answer, many writers have offered nothing but discouragement. We have been told that our government is prac-

tically and theoretically wrong; that democracy is a failure; that as wealth and population increase our only salvation lies in the re-establishment of an aristocracy or a limited monarchy. Are these portrayals true pictures of our condition or are they simply a recital of some of the repulsive and disheartening details of a conflict that is being successfully waged in the interest of the welfare of society?

Before attempting to answer questions as to the tendency of the age, we will first undertake to answer those propounded in the last part of the preceding chapter. The subversion of government in the interest of a few, the activities of organized spoliation operating through and by means of government, are the conditions which have threatened us. How have the people met the issues presented? How have they adapted their institutions to these conditions for mutual protection and general welfare?

As already shown, the method employed by the predatory group for attaining their ends has been that of gaining control over party organization—the organ of the popular expression—the only device known to popular government by which the will of the people can be determined. This organ having come under their control, the salaries of office and all of the economic advantages attainable through the exercise of sovereign functions in their own interest became the legitimate spoils of conquest, and these spoils are made both the means and the end to further maintaining their organized control. The right of peaceable assembly, of freedom of organization and association, however, could not be denied. The exercise of such rights are fundamental to the whole fabric of government based on public opinion, and the expression of popular will. To take away this means employed by the predatory group would also deprive the nation of political life. The only means left to the people by which

they could cope with those having control of the organs of popular expression was, in their constituent and legislative assemblies, to take away from the predatory group the means and inducement to predatory organization and control. By taking away the means and inducement to spoliation through the government the people might retain all of the means of popular expression, relieve the organs of the popular will from the danger of subversion and leave the party free to act in the interest of the public welfare—the purpose of its existence. The only inducements to spoliation being “patronage,” “spoils,” and these being found in official salaries and in the exercise of the functions of government for private gain or as a reward for party service, we will first look to the modification of our law in this interest, and in the order *c. 8.* named.

The “spoils of office” are secured in two ways, viz., by election and by appointment. Election involves an expression on the part of the political people. The drift of constitutions and legislation during the last century has been in the direction of protecting the voter from undue influence and giving correct returns of his expression; of preventing the subversion of the public will. At the time of our National establishment very little had been done in this direction. Popular government on an imperial scale was an untried experiment. The inducement to predatory activity in the lesser political divisions was small. Viva voce voting was common. It was not found necessary to protect the individual voter from coercion or to compel strict supervision over returns. The general welfare was not threatened by a party of organized despoilers as comprehensive as the nation, and trained in all the details of electoral conquest—an organization generated and captained and under as complete control as an army of invasion, reaching even to the smallest precincts, but governed by a central head



whose orders were as imperative as those of a military chief—these are conditions which were developed later. But as the military group had been one of the agencies of extending co-operation in government, and as it finally became the means of its own subordination, so in the political party this broad predatory organization became the means of united effort in its own overthrow. The rivalry for spoils created two great predatory organizations, and in the conflict that ensued between them, like the contest of monarch and nobility, that organization was successful which appealed most strongly to popular interest. The result was a gradual evolution of checks upon the activities of each other. Whenever there was any considerable movement on the part of the people, independent of these predatory organizations, to obtain security from the incursions of the party in power, the party out of power, as a means of getting control of government in its own interest, became the champion of popular demands;<sup>1</sup> and as a result was placed in control at the elections. Thus, though each party has despoiled the public in turn, yet with each defeat of the party in power new restraints have been imposed upon spoliation; new safeguards erected, and new provisions have been made for good government. In this manner our election laws have been largely perfected. In each constitutional convention and each meeting of the legislature new measures of safety have been adopted, till at present every device that the wit of man has been able to evolve has been employed in the interest of securing an unbiased expression. These provisions have been of two kinds; first, those for giving greatest secrecy and freedom for the individual voter, and, second, those imposing the greatest publicity and restraint on the officers of government charged with the machinery of elections, there-

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<sup>1</sup> See the political platforms of parties and compare with current popular agitation.

by furnishing a double check on all efforts to control popular expression, and an adequate means of making the voice of the elector strictly his own.

The necessity for freedom of expression in republican government was so apparent that many of our early constitutions declared the principle in their bills of rights. "That all elections ought to be free,"<sup>2</sup> "all elections shall be free and equal;"<sup>3</sup> "that the right of the people to participate in the legislature is the best security of liberty and the foundation of all free government; for this purpose elections ought to be free and frequent,"<sup>4</sup> are among these early formulæ. Declarations of like purport are now found in nearly all of the constitutions.<sup>5</sup>

Provisions against coercion and intimidation are of two kinds, namely: those against the use of the forces of government for the purpose of coercing or intimidating the voter, and those against coercion or intimidation by private means. The ardor of those in power to perpetuate their rule and to obtain authority for its perpetuation by gaining a semblance of popular approval in election has led to the use of armed force. The "Manchester Massacre" in England, 1819, in which several hundred persons were maimed or killed by the descent of the military upon a large assembly of radicals whose object it was to defeat the administration in the coming election and procure certain reforms, is a very striking

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<sup>2</sup> Penn., Const. 1776, Dec. of R., VII; N. H., Const. 1784, B. of R., XI; N. H., Const. 1792, B. of R., 11.

<sup>3</sup> Del., Const. 1792, I, 3; Del., Const. 1831, I, 3.

<sup>4</sup> Md., Const. 1776, Dec. of R., V.

<sup>5</sup> Ark., Const. 1874, III, 2; Colo., Const. 1876, II, 5; Del., Const. 1831, I, 3; Ill., Const. 1870, II, 18; Ind., Const. 1851, II, 1; Ky., Const. 1859, XIII, 7; Mass., Const. 1780, I, 19; Md., Const. 1867, Dec. of R., 7; Neb., Const. 1875, I, 22; N. H., Const. 1792, I, 11; Penn., Const. 1873, I, 5; N. C., Const. 1868, I, 10; Ore., Const. 1857, II, 1; S. C., Const. 1868, I, 31; Tenn., Const. 1870, I, 5; Mo., Const. 1875, II, 9; Va., Const. 1870, I, 8; Vt., Const. 1793, I, 8.

example of this kind.<sup>6</sup> Very little has occurred in this country to call for legislative action on the subject of military coercion except in the attitude of the general government subsequent to the late war. Section 2002 of the Revised Statutes of the United States prohibits the bringing of armed forces to a place where an election is in progress, except to repel the enemies of the United States or to keep the peace. Several provisions are also found in the State constitutions, as "that no power, civil or military, shall ever interfere with the free exercise of the right of suffrage."<sup>7</sup> The defeat of the "Force Bill" also has some significance in this relation. Says Cooley:<sup>8</sup>

The ordinary police is the peace force of the State, and its presence suggests order, individual safety, and public security, but when the military appears upon the stage, even though composed of citizen militia, the cir-

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<sup>6</sup> "On the 16th St. Peter's Field, in Manchester, became the scene of a deplorable catastrophe. Forty thousand men and two clubs of women reformers marched to the meeting, bearing flags, on which were inscribed the objects of their political faith, 'Universal Suffrage,' 'Equal Representation or Death,' and 'No Corn Laws.' However menacing their numbers, their conduct was orderly and peaceful. Mr. Hunt, having taken the chair, had just commenced his address, when he was interrupted by an advance of cavalry upon the people. The Manchester Yeomanry, having been sent by the magistrates to aid the chief constable in arresting Mr. Hunt and other reform leaders on the platform, executed their instructions so awkwardly as to find themselves surrounded and hemmed in by a dense crowd—and utterly powerless. The Fifteenth Hussars, now summoned to their rescue, charged upon the people sword in hand, and in ten minutes the meeting was dispersed, the leaders were arrested, and the terrified crowd driven like sheep through the streets. Many were cut down by sabers or trampled upon by the horses, but more were crushed and wounded in their frantic struggles to escape from the military. Between 300 and 400 persons were injured, but, happily, no more than five or six lives were lost."—May, *Cons. Hist. of Eng.*, Vol. II, p. 354 (London Ed., 1889).

<sup>7</sup> Ark., Const. 1874, III, 2; Colo., Const. 1876, II, 5; Mo., Const. 1875, II, 9; Neb., Const. 1875, I, 22; Penn., Const. 1873, I, 5.

<sup>8</sup> Cooley, *Const. Lim.*, Sec. 615.

cumstances must be assumed to be extraordinary, and there is always an appearance of threatening and dangerous compulsion which might easily interfere seriously with that calm and unimpassioned discharge of the elector's duty which the law so justly favors. The soldier in organized ranks can know no law but such as is given him by his commanding officer, and when he appears at the polls there is necessarily a suggestion of the presence of an enemy against whom he may be compelled to exercise the most extreme and destructive force, and that enemy must generally be the party out of power, while the authority that commands the force directed against them will be the executive authority of the State for the time being wielded by their opponents.

This abuse, however, has never threatened us to such an extent as to demand constitutional protection. The official coercion and intimidation in our system has come from other sources such as the employment of the courts, of election boards, etc., in the interest of party success. In order that the processes of justice might not be abused, the constitutions of many States have made provision that the courts shall not be open on election days.<sup>9</sup> In most of the States the constitution provides that electors shall be free from arrest while attending, going to and returning from the polls, except for treason, felony, or breach of the peace.<sup>10</sup> This provision includes arrest

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<sup>9</sup> "Courts are not allowed to be held, for two reasons—that the electors ought to be left free to devote their attention to the exercise of their high trust [voting], and that suits, if allowed on that day, might be used as a means of intimidation."—Cooley, *Const. Lim.*, pp. 614-15.

<sup>10</sup> Ala., *Const.* 1875, VIII, 4; Ark., *Const.* 1874, III, 4; Cal., *Const.* 1880, II, 2; Colo., *Const.* 1876, VII, 5; Del., *Const.* 1831, IV, 2; Ga., *Const.* 1877, II, 3; Ill., *Const.* 1870, VII, 3; Ind., *Const.* 1851, II, 12; Iowa, *Const.* 1857, II, 2; Kans., *Const.* 1859, V, 7; Ky., *Const.* 1850, II, 9; La., *Const.* 1879, 189; Miss., *Const.* 1869, IV, 7; Mich., *Const.* 1850, VII, 3; Me., *Const.* 1820, II, 2; Neb., *Const.* 1875, VII, 5; Ohio, *Const.* 1851, V, 3; Ore., *Const.* 1857, II, 13; Penn., *Const.* 1873, VIII, 5; S. C., *Const.* 1868, VIII, 6; Tenn., *Const.* 1870, IV, 3; Tex., *Const.* 1876, VI, 5.

on civil process in Connecticut,<sup>11</sup> Minnesota,<sup>12</sup> Nevada,<sup>13</sup> Virginia<sup>14</sup> and West Virginia.<sup>15</sup> In eight States electors are not required to perform military duty on election day, except in time of war or public danger.<sup>16</sup> In some States also civil process may not be served on election days.

Coercion and intimidation by election officers is prevented in many ways, as by making their duties specific,<sup>17</sup> precluding the officer from obtaining any knowledge as to how the elector may have voted,<sup>18</sup> provisions for registration, thereby establishing the right to vote prior to election day,<sup>19</sup> laws requiring the election officer to receive a ballot, though challenged, when the required oath has been administered.<sup>20</sup>

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<sup>11</sup> Conn., Const. 1818, VI, 8.      <sup>14</sup> Va., Const. 1870, III, 4.

<sup>12</sup> Minn., Const. 1859, VII, 5.      <sup>15</sup> W. Va., Const. 1872, IV,

<sup>13</sup> Neb., Const. 1864, II, 4.      4.

<sup>16</sup> Cal., Const. 1880, II, 3; Ill., Const. 1870, VIII, 3; Ia., Const. 1857, II, 3; Mich., Const. 1850, VII, 4; Me., Const. 1820, II, 3; Neb., Const. 1875, VII, 5; Ore., Const. 1857, II, 13; Va., Const. 1870, III, 4; W. Va., Const. 1872, IV, 4.

<sup>17</sup> Two of the States make these specifications in their constitutions.

<sup>18</sup> In several States provisions of this kind are found in the constitutions: Ark., Const. 1874, III, 3; Colo., Const. 1876, VII, 8; Mo., Const. 1875, VIII, 3; Penn., Const. 1873, VIII, 4; W. Va., Const. 1872, IV, 2. Most of the other States provide for this by statute laws.

<sup>19</sup> See Am. Eng. Ency. Law, Vol. VI, p. 292, n. 1, concerning effect of registration in this particular in Conn., La., Tenn., Ark., Mass., Mo., Cal., etc.

<sup>20</sup> "If the inspectors of elections refuse to receive the vote of an elector duly qualified they may be liable both civilly and criminally for so doing; criminally, if they were actuated by improper and corrupt motives; and civilly, it is held in some States, even though there may have been no malicious design in so doing. \* \* \* Where \* \* \* by the law under which the election is held, the inspectors are to receive the voter's ballot if he takes the oath that he possesses the constitutional qualifications, the oath is the conclusive evidence on which the inspectors are to act, and they are not at liberty to refuse to administer the oath, or to refuse the vote after the oath has been taken; they are ministerial officers in such case, and have no discretion but to obey the law and receive *the votes*."—Cooley, Const. Lim., 617.

Intimidation of voters by individuals or groups of individuals has been the subject of still more extensive legislation. Many of the constitutions provide that the right of suffrage shall be protected from power, bribery, tumult, improper conduct, etc.,<sup>21</sup> and these constitutional provisions have been supplemented by statutes fixing heavy penalties for infractions. We have but to refer to the political and penal codes of our several States to acquaint ourselves with the extensive provisions against the use of coercion, intimidation, undue influence, treating, betting, bribing, providing conveyance, making promises of employment, threats of discharge, and all other forms of corruption and coercion. In all of these measures the efforts of law-makers have been supplemented by the activities of the courts in enlarging their control by the use of writs and extraordinary process.

Secrecy to the individual voter as a means of thwarting the designs of those who would seek to control his political expression has been secured by provisions for written ballot<sup>22</sup> instead of viva voce<sup>23</sup> voting, require-

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<sup>21</sup> Ala., Const. 1875, I, 34; Cal., Const. 1880, XX, 11; Conn., Const. 1818, VI, 6; Fla., Const. 1868, IV, 24; Ky., Const. 1850, VIII, 4; Ore., Const. 1857, II, 8; Nev., Const. 1864, IV, 27; S. C., Const. 1868, I, 33; Tex., Const. 1876, XVI, 2; W. Va., Const. 1872, IV, 11.

<sup>22</sup> Ala., 1875, VIII, 2; Cal., 1880, II, 5; Colo., 1876, VII, 8; Conn., 1818, VI, 7; Am. 6; Del., 1831, IV, 1; Fla., 1868, XIV, 5; Ga., 1877, II, 1; Ill., 1870, VII, 2; Ind., 1851, II, 13; Iowa, 1857, II, 6; Kans., 1859, IV, 1; La., 1879, 184; Me., 1820, II, 1; Md., 1867, I, 1; Mass., 1780, II, 1; Mich., VII, 2; Minn., 1857, VII, 6; Miss., 1869, IV, 7; VII, 1; Mo., 1875, VIII, 3; Neb., VII, 6; Nev., 1864, II, 5; N. H., 1792, II, 14; N. Y., 1846, II, 5; N. C., 1868, VI, 3; Ohio, 1851, V, 2; Penn., 1874, VIII, 4; R. I., VIII, 2; S. C., 1868, VIII, 1; Tenn., 1870, IV, 4; Tex., 1876, VI, 4; Vt., 1793, II, 8, Am. 19; Va., 1870, III, 2; W. Va., IV, 2; Wis., 1848, III, 3.

<sup>23</sup> In Kentucky, by the constitution of 1850, VIII, 15, all elections by the people were required to be by viva voce vote, except that dumb people might vote by ballot, and quite a number of other States provided for like method where the people acted in representative capacity. This, however, has been abandoned in nearly every State.

ments for uniform ballots instead of the many colored and many sized mixture at one time used as a means of detection, provisions for individual and secret booths for the use of the voter in preparation of his ballot, laws preventing the attendance of loungers and campaign lieutenants at or near the polls, devices to prevent official knowledge as to contents of ballots cast by particular electors, or, in case of official knowledge obtained in rendering necessary assistance in preparation of ballots, imposing secrecy under penalty, etc.

On the other hand, publicity on the part of the public agents and officers of election as a means of preventing official and party fraud has been secured by laws requiring acts to be done in plain view, subject both to public and official inspection. Notice of the exact time and place is made a prerequisite to a valid election.<sup>24</sup> To insure this notice the time is usually fixed by statute or constitution,<sup>25</sup> so that there can be no surprise or unfair advantage taken by arbitrary action in the interest of a particular "clique." Provisions are also made for giving the greatest publicity to the count and canvass of returns, as a further guarantee appeal for unwarranted acts on the part of officers, contest of elections on the ground of fraudulent or illegal acts which may have affected the result are provided for. The Australian ballot system, recently adopted by so many of our States, marks the climax of success as a device both for securing secrecy to the individual and publicity to official acts. The ballot machine, perhaps, holds out some further advantages of security and automatic accuracy. In protecting the voter from undue influence, in making provision for correct returns of electoral expression the adaptation has been complete. Our elections in this respect have come to be such as our form of government

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<sup>24</sup> Am. and Eng. Ency. Law, Vol. VI, p. 297; VI, 1, et seq.

<sup>25</sup> See constitutions and statutes of various States.

demands—quiet, orderly days on which the citizen is allowed to go to the polls unhampered by threats or coercion, to cast his ballot unmolested and in secrecy, while official acts are given the greatest publicity and are subject to closest scrutiny and review. In this the American people may be said to have been eminently successful. Some improvement may still be made by way of forbidding electioneering on election days, by compelling candidates to administer their campaign expenditures through authorized boards, by making public the amounts expended for election purposes and the manner in which used.<sup>26</sup>

In one element, however, our electoral system is still sadly deficient. It was the prime purpose of the founders of our political establishment to make the government representative. In this they failed. Instead of establishing a government that was representative of the whole people, they so devised the electoral system that it represented the majority only. They failed to distinguish between a government in which the ruling majority of the people had a ruling majority of the representatives and a government made up entirely of the representatives of the ruling majority, in which the minority had no voice. It was many years after the establishment of popular government before much thought was given to the principles of representation; it was many years before the tyranny of majorities imposed itself with such force as to cause statesmen to inquire. Mr. Thomas Gilpin was one of the pioneers in this style of reflection.<sup>27</sup> The value of the distinction to government based on the principles of general welfare is very great. A failure to make the distinction has been the cause of many of our

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<sup>26</sup> See Appendix for the "English Corrupt Practice Act" and the "Massachusetts Election Law."

<sup>27</sup> See Gilpin, "On the Representation of Minorities, Etc.," pub. 1844.



political misfortunes. It has laid the foundation for and been one of the chief means of the prostitution of our government.

Majority government leads to excesses. It places the management of affairs during a term of office entirely in the hands of a majority. There may be a majority of but one elector at the election, or under our district system it often happens an actual minority; and yet the representatives of the successful party alone will be placed in power. There is no representation of the will of the minority—"the defeated parties"—in the government itself. They must remain wholly unrepresented till another election two or four years hence, as the case may be, when they themselves will have a chance to get entire control and leave the other parties wholly unrepresented. The excesses which such a system leads to and permits are illustrated in many of the acts of government under this regime. It not only leads to excesses, but also precludes any sort of responsibility except in so far as the party in power may be held responsible to the extent of losing their control at the next election.

The theory of representation in government being wrong, the whole electoral system was placed on an improper basis. The form of popular expression which was the logical accompaniment of majority government was that of a "general ticket," called in France "*scrutin de liste*." Under this system the electors of each political division are allowed to cast a vote for one candidate for each office to be filled in that division, and those candidates who receive the greatest number of votes for each office are declared elected. In this way the majority party takes complete possession of the deliberative bodies as well as the administrative departments, and the minority has no representation whatever.<sup>28</sup>

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<sup>28</sup> "With such a system, the question of equal representation plays no part whatever. The minority parties are without a

The form of election closest to the "general ticket," but one step removed from majority rule in the direction of representative government is the "District system." This makes provision for minority representation in the general government by dividing the territory into districts and allowing each district to send its majority representatives, so that, in case any district is strong in the minority party, the representatives of the minority party in this district will have a share in the affairs of the State. The district system has two forms, viz.: the small "one membered district" and the large "multiple membered district." As stated before, this system gives an opportunity for minority representation, but is subject to so many evil practices as to make it the worst possible form. In the first place, it subjects the district to all of the faults of majority representation that the general ticket does the State. In the second place, it has given birth to the "gerrymander," a practice whereby the State is so districted by the partisan legislature as to cause the greatest loss of voting strength to the party out of control, and to give the greatest effect to the voting power

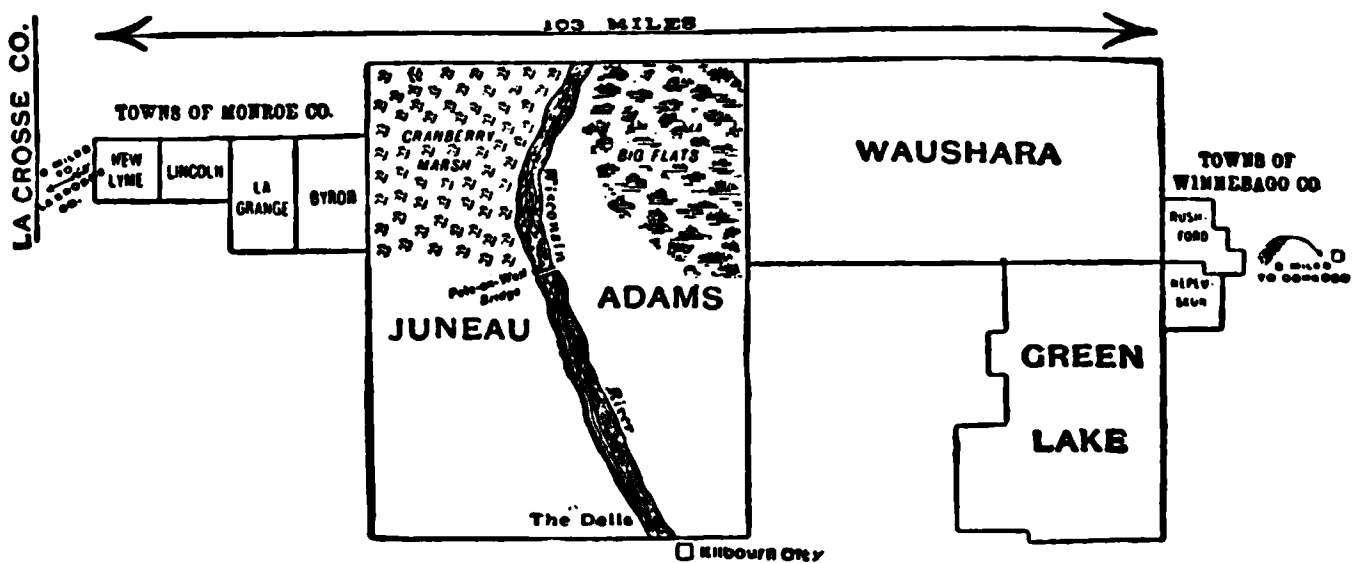
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single representative. \* \* \* For example, the city of Cleveland, Ohio, recently introduced, with the sanction of the State legislature, a far-reaching reform in its system of public schools, one feature of which is the election of a school board of seven members on a general ticket. In the first election under this plan the vote stood as follows:

Republican.		Democratic.	
Buss .....	15,714	Dodge .....	13,661
Boutell .....	15,595	Gouldin ....	13,551
Backus .....	15,385	Pollner .....	13,306
House .....	15,860	Ryan .....	12,851
Daykin .....	16,198	Burke ....	12,814
McMillan' .....	15,690	Hoffman .....	12,777
Ford .....	16,036	Plent .....	12,804

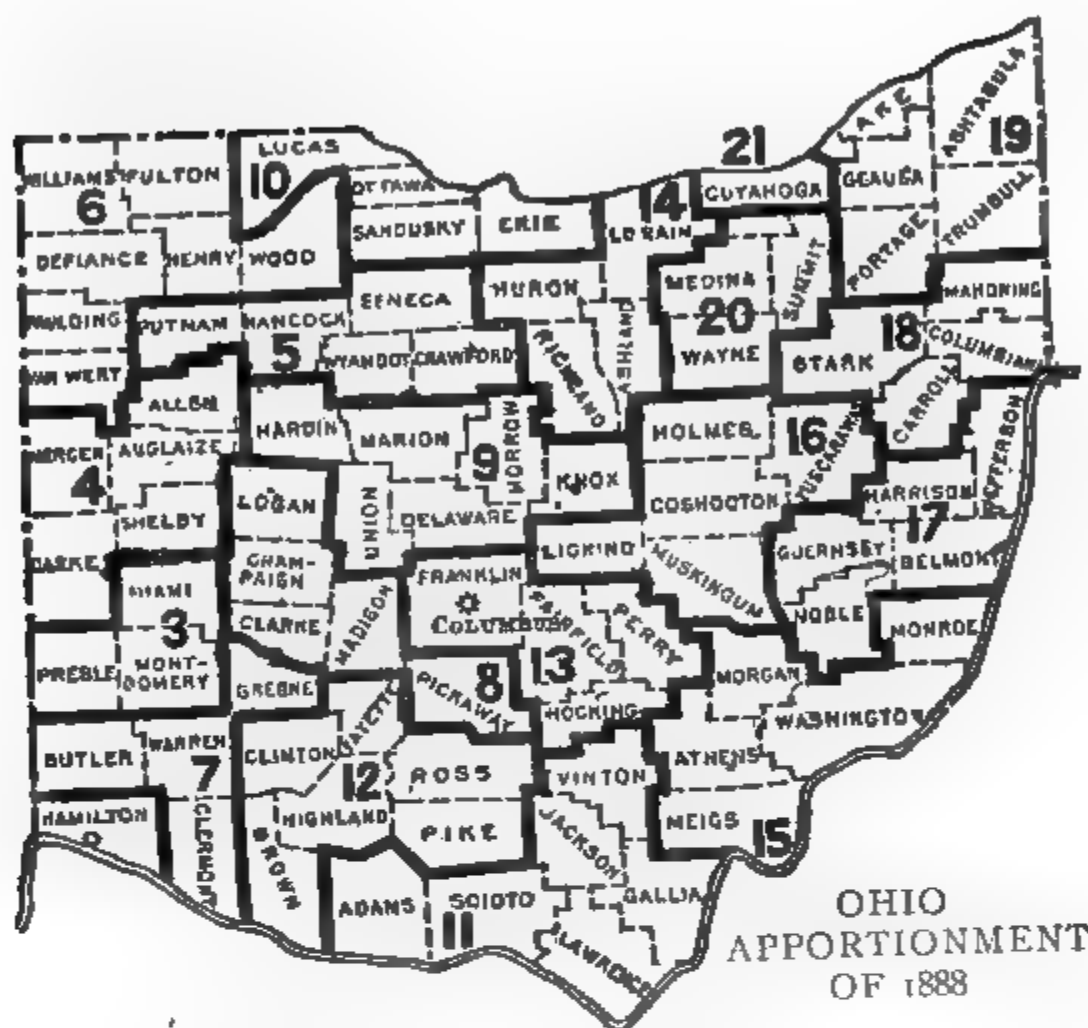
"It will be seen that the Republicans obtained the entire board, but had there been a change of only 1,000 or 2,000 votes from Republicans to Democrats the Democrats would have carried their entire list.—Commons, Proportional Representation, p. 86.

to the party in control. It often happens, therefore, that the minority instead of the majority rules. This is even more vicious than the majority rule, as it places the government in opposition to the expressed will of a majority of the people. It is a still more dangerous form of tyranny, and wholly foreign to the spirit of our institutions. The possibility of a gerrymander offers an inducement to corrupt practices on the part of the legislature of the State, and when employed in this work, the highest deliberative body of the State is degraded to the level of the lowest ward committee. The length to which legislatures have gone in the interest of party "spoils" is well illustrated by Mr. A. J. Turner, in "The Gerrymander of Wisconsin." On page 26 we find the following diagram of the Ninth Senatorial District, apportionment of 1891:



The reapportionment of congressional districts in Ohio (1888) which made one Republican vote equal to three Democratic votes, is quite as interesting.

The apportionment of 1890 for the Fourth and Seventh Congressional Districts of South Carolina is characteristic. These districts, as shown in accompanying cut, are flagrant distortions in the making of which little regard is had for county lines. Party success is the only end in view at the time of making a "gerrymander."



These legislative grovelings are quite as significant as that historic act of apportionment in Massachusetts, from which the practice first got its name.



In the third place the district system furnishes an inducement for the use of every form of corruption in doubtful districts, these being strategic points in the campaign for spoils. Nothing better illustrates the working of this principle of elections than the presidential elections. Under the present practice the several States are the districts, in each of which a number of presidential electors equal to the number of senators and representatives are to be elected on a "general ticket." In a State like Texas, where at times there have been democratic majorities of something like 200,000 votes, there is little effort made. Others are equally "solid" republican States, but in States like New York and Indiana,

which are doubtful, which have a large number in the electoral college, and whose electors will practically insure the success of the party securing them, every device fair or foul is employed to win votes; the whole party machinery of the nation is set at work to capture these votes; money is poured into the till of the campaign central committee from every precinct; millions of dollars are collected as a fund for bribery and corruption; the State is districted for party purposes; every district is blocked out and officered by a party lieutenant who has under him sub-workers; every voter is "sounded." If he can be bought, means are at hand for that purpose; if he can be influenced by patronage, this is apportioned; if he can be "colonized," provisions are made to this end; if by any hook or crook he can be taken into camp, nothing is left undone to accomplish it, but if he cannot be won over, then, as a last resort, debauchery by drunkenness, "spiriting away," and every means possible is employed to make him inefficient in the service of the enemy. Nothing more reprehensible could be imagined than the practices made possible under the district system. And nothing has been so great a menace to the freedom of our institutions. No plan could be more favorable to the success of organized corruption and spoliation.

The next step in the evolution was that of a "limited vote." This system was used for nine years in the election of aldermen in New York. It is a modification of the district system. The city was divided into districts, in each of which three aldermen were to be elected. Instead of allowing the voter to vote for three candidates he was allowed to vote for two only. The majority party could, therefore, elect only two candidates, except in wards where two-thirds or more of the voters were of one party. Boston adopted the same system for the

selection of her twelve aldermen-at-large, the voter having only seven votes. The majority could ordinarily elect only seven of the twelve. By this method, however, representation is not proportional and does not accord with popular expression. Moreover, it furnishes a means of party manipulation, and often sacrifices many votes. It does not provide for any added independence to the citizen. It does not make the majority more highly responsible. It does not give such a force to "independents" as to make them a factor in politics.

The "cumulative vote" is still another step in the right direction. By this device the elector is allowed to cast as many votes as there are representatives to be elected, or, in case of the election of a board, as many as there are members to be elected. These votes may be distributed as the voter pleases. They may be given, one to each of the candidates, or all to one, or divided in any way to suit him. When applied to the election of representatives the State is divided into large "multiple membered districts." For example, in Illinois each district has three representatives, and the voter can give one vote to each, three to one, two to one and one to another, or one and one-half to each of two. In this way a small minority may elect a representative, when under any other system it would have none. This, however, at times works ruinous results. It sometimes gives the government to a minority, sometimes wastes a large number of votes, and sometimes permits of very dangerous political combinations.

The effects of the cumulative system in Illinois have been summarized as follows:<sup>29</sup>

1. It appears that representatives of third parties do

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<sup>29</sup> Commons, *Proportional Representation*, p. 93; from M. N. Forny, *Political Reform by Representation of Minorities*, New York, 1894.

not, as a rule, secure election. In 1892 the prohibitionists in the State mustered for representatives 24,684 voters (not votes); the people's party 20,108, out of a total of 872,948. If these parties could have concentrated their votes, they would have elected four and three members respectively, out of a total of 153. In the election of 1894, the results were as follows:

### Illinois Legislature, 1894.

	Votes for Representatives.	Per cent of total.	Representatives elected.	Proportional.
Republicans . . . . .	1,332,488	53.4	92	82
Democrats . . . . .	914,735	37.2	61	57
Prohibitionists . . . .	43,402	1.7		3
People's Party . . . . .	174,465	7.1		11
Independent . . . . .	6,323	.2		
Ind. Democrats . . . .	1,407			
Ind. Republicans . . . .	8,867	.3		
Amer. Citizen . . . . .	2,585	.1		
Scattering . . . . .	2,575			
Total . . . . .	2,486,847	100.	153	153

The elections are therefore confined, as in the limited vote, to the candidates of the two dominant parties. Unlike the single-membered district system, however, both parties have representatives from every part of the State instead of from the strongholds only, and there are no hopeless minorities of the two main parties.

2. Votes are wasted whenever a popular candidate receives "plumpers" beyond the number necessary to elect him. "A candidate who runs far ahead is just as dangerous to his own party as a man who runs far behind. Under the old system the man who runs ahead does so at the expense of his adversary, but under the cumulative system it is at the expense of his colleague." For example, in the election of 1894 the vote of the forty-fifth district was as follows:



Callahan.....	Republican.....	11,140
Black .....	Democrat.....	9,793½
Tiptit .....	Democrat.....	9,699½
Lathrop .....	Republican.....	9,628
Palmer .....	People's Party.....	2,921½
Smith .....	Prohibition.....	960

The total Republican votes were 20,768, representing approximately 6,923 voters; the Democratic votes were 19,493, representing 6,498 voters. Yet the Democratic minority elected two representatives and the Republican plurality only one, because Callahan, Republican, received at least 1,400 votes more than he needed, but his colleague, Lathrop, lacked at least 75. This result occurred in one district in 1892, and in three districts in 1894.

3. In order to obviate this waste, all the resources of the party managers are enlisted, and the party machine becomes even more indispensable than under the old system. In the first place, the managers determine how many candidates shall be nominated. Only where the parties are close, as in the forty-fifth district above cited, do both parties nominate two candidates. In other cases the minority party nominates but one, and a nomination is equivalent to an election. For example, the vote in the thirty-sixth district was:

Kitz Miller.....	Republican.....	16,525
Minuts.....	Democrat.....	9,013½
Jones.....	Democrat.....	9,059
Winters.....	People's Party.....	2,360
Kelly.....	Prohibition.....	1,117

The Republicans, though lacking but 1,500 of the Democratic vote, nominated but one candidate. Again in close districts the managers must exercise great care in selecting good "running mates," as did the Democrats in the forty-fifth and thirty-sixth districts. For these reasons the party organization is greatly strengthened, there is a strong opposition to "plumping," and voters are careful not to disobey the party instructions.

4. The quality and ability of representatives are no

better than under the old system. In close districts, where four candidates are nominated, there may be slight improvement, but in other districts, where a nomination is equivalent to an election, the worst elements get control and bid defiance to the people. There are frequent "deals" between parties, the minority agreeing to put up one man, and the "gang" in both parties controlling the primaries.

The cumulative vote, therefore, whether in small or large constituencies, must involve either waste and guesswork, or extreme dictatorship of party machinery.

Another device adopted as a means to representative government is that of "indirect election." This method was quite common during the first two or three decades of our national history. It took the forms of election of State officers by the State legislatures, and by councils of appointment; and in the national government the election of president and senators by an electoral college and the legislature. It was originally intended to make the government, as far as possible, non-partisan, representative, and to insure a high degree of ability and merit. It failed in all these respects. It not only failed, but became one of the chief instruments of corruption and "spoils." On this account the system has been eliminated from the States. The rigidity of the federal constitution has so far precluded a change there, and it stands out to-day as a revolting blotch on our national system. Senatorial seats are bought and sold. The successful candidate for President is necessarily a machine man. The system of indirect election remains as a condition which demands a remedy at the hands of the people. It stands as a bar to progress, and must be removed before we can hope to attain a true representative government.

It appears, therefore, that our elections have become "free," but that they are not "equal." That every protection is given against threats, coercion and undue in-

fluence; that provision has been made for secrecy to the individual, publicity to official acts, accuracy and justice in making returns, and that efforts are being made to control the conduct of campaigns in the interest of public honor and safety, but it also appears that something still remains to be done before the citizen is guaranteed equality of suffrage and a representative government instead of machine and majority rule. *c* *8*

As to appointments: Here, too, we have made marked progress within the last century. The "spoils" system employed in the States from the first inception of party activity, later ushered into the federal administration, and firmly fixed upon it by Andrew Jackson, in 1828, has been gradually giving way to the "merit" system of appointments. "Civil Service Reform" has been the slogan of progress for the last fifty years. The first reform measures in the matter of appointment were in the nature of constitutional provisions taking this power out of the hands of the legislature and putting it in the hands of the executive, or the people in popular elections. In the hands of the governor, however, it was also used to party and to personal ends. With the patronage of office in his hands his position became of supreme advantage in the quest for spoils. This fact not only encumbered and degraded the highest executive office, but also weakened the administration and loaded the people with an incompetent and supernumerous administrative service. Agitation for the adoption of the merit system began early in the century.<sup>30</sup> In 1853 the subject found expression in a federal statute.<sup>31</sup> But this

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<sup>30</sup> In December, 1841, President Tyler, by message, recommended the adoption of a merit system of appointments. A bill following his suggestion was introduced into the house by Mr. Gilmer, but received little support.

<sup>31</sup> U. S. Statutes at Large, March 3, 1853, Ch. 97, Sec. 3. This statute provided: "That from and after the thirtieth of June, eighteen hundred and fifty-three, the clerks in the De-

statute made no practical change, as the examining officers were the same as those who made the appointments, and the examinations were little more than a farce. At most the same political influences were left to work out their peculiar ends.

During and subsequent to the Civil War the spoils system obtained fullest sway. The government became prostituted to a mammoth system of political plunder. Availing themselves of national sentiment as a means of gaining control, the quasi patriots who controlled the party councils and exercised the powers of government built up a system of political lechery such as would have done credit to a Roman provincial governor. Another attempt to inaugurate the merit system was made in 1871.<sup>32</sup> On March 3d of that year, the last day of the forty-first Congress, a law was passed which empow-

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partments of the Treasury, War, Navy, the Interior, and the Post Office, shall be arranged in four classes, of which class number one shall receive an annual salary of nine hundred dollars each, class number two an annual salary of one thousand two hundred dollars each, class number three an annual salary of one thousand five hundred dollars each, and class number four an annual salary of one thousand eight hundred dollars each. \* \* \*

"No clerk shall be appointed in either of the four classes until after he has been examined and found qualified by a Board, to consist of three examiners, one of them to be the chief of the Bureau or office into which he is to be appointed, and the two others to be selected by the head of the Department to which the said clerk will be assigned. \* \* \*

"Each head of the said Departments may alter the distribution herein made of the clerks among the various Bureaus and offices in his Departments if he should find it necessary and proper to do so."

<sup>32</sup> S. at L., 1871, Ch. 114, Sec. 9, March 3. Sec. 9: "That the President of the United States be, and he is hereby, authorized to prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof, and ascertain the fitness of such candidates in respect to age, health, character, knowledge and ability for the branch of the service into which he seeks to enter; and for this purpose the President is authorized to employ suitable persons to conduct said inquiries, to prescribe their duties, and to establish regulations for the conduct of persons who may receive appointments in the civil service."

ered the President to prescribe such rules as might be necessary to "best promote the efficiency" of the civil service and "ascertain the fitness" of candidates. But the next Congress, and in fact every Congress following, refused to make appropriations and other arrangements necessary to the carrying of the act into effect, and the law simply remained as a historic expression. The reason for inaction on the part of Congress is explained by the report of the Civil Service Commission.<sup>33</sup>

When the security of the Republican party had been shaken by such excesses as these, and the people were finally aroused against wholesale spoliation and misrule, when the administration had all but lost in one national contest, and was only saved by an electoral commission, it became necessary, on the approach of another election, for it to satisfy this popular clamor for civil service reform, or suffer loss of their entire hold on the government. A law was then passed to secure this end. The law of 1883<sup>34</sup> follows in its essential characteristics the civil service law of England.<sup>35</sup> The law of 1883 first

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<sup>33</sup> See extract of report, *supra*, p. 272.

<sup>34</sup> "An Act to Regulate and Improve the Civil Service," passed Jan. 16, 1883; Chap. 27 of S. at L., 1883.

<sup>35</sup> England had a marked advantage over the United States in the establishment of civil service on the merit system. Appointments were usually by the executive in both countries. In England, prior to 1855, the whole political machinery, its party organization and the forces which tended to mold the institutions, had been built up in opposition to prerogatives of the executive. The executive being hereditary, and his appointees being largely dependent on his will, even the spoils-men, in so far as not associated with the crown, all those who hoped to work by popular consent were arrayed against unrestricted powers of appointment. Here, under our party systems, our executive became the chief lever in the "machine," and all of the party machinery was put in motion to retain these appointments as party spoils. Then, too, the legal notion that an appointee had a right to an office growing out of "hereditary succession and life tenure" was a condition which made removals and new openings scarce. It was not worth while to organize for appointments. Therefore the easier and earlier adoption of the merit system in England and other European states.

provided for a separate, continuous, bi-partisan commission composed of three commissioners, who should "hold no other official place under the United States," the duties of which commission was to aid the President in making rules, and when these rules should be promulgated, to assist in all proper ways in carrying them into effect. The act further prescribed as essential to these rules:

1st. That there should be open competitive examinations testing the fitness of applicants for the classified public service.

2nd. That all the offices, places and employments so arranged or to be arranged in classes should be filled by selections according to grade from among those graded highest as the result of such competitive examinations.

3rd. That appointments to the public service aforesaid in the departments at Washington should be apportioned among the States and territories according to population as ascertained by the census.

4th. That there should be a period of probation to further test the fitness of the applicant, before absolute appointment.

5th. That no person in the public service should be under obligation to contribute to any political fund, and should not be removed or otherwise prejudiced by refusing so to do.

6th. That no person in the service should have a right to use his official authority to influence or coerce political action of any other person or body.

7th. That provision should be made for filling places by non-competitive examination when competent persons do not compete for places.

8th. Provisions for notice, records, reports, etc.

The other sections of the act were such as to provide for salaries, reports, records of proceedings, examina-

tions, quarters, penalties for infractions of law and rules, classification of officers and employees by departments, etc.

Officers not in the executive branch of government, persons employed as laborers or workmen, and those appointed with the advice and consent of Senate were excluded from operation of the law.

The benefits of this law to the service have been almost inestimable. From the time of its taking effect to the present, its operation has been gradually extended. The classified service now includes: (1) clerkships in the chief departments at Washington, the Civil Service Commission and the Department of Labor; (2) all customs offices having over thirty employees, whose salaries are \$900 or more; (3) the departmental postal service, including all free delivery offices; (4) the entire railway mail service; (5) the Indian service, including physicians, teachers, matrons, etc. Out of the 180,000 federal employees, 87,000 are now in the classified service. The Commission has recommended to the President its extension (1) to the mints and sub-treasuries; (2) to every branch of the customs service having twenty-five or more employees; (3) to the navy yards employees; (4) to all employees of District of Columbia.

The example of the national government has been followed by several of the States in regulations for the civil service of the large cities. The law of Illinois passed March 20, 1895, is one of the best of these. It is a local option law, and was adopted soon after its passage by the people of the city of Chicago at an election held for that purpose. The obstacles to the successful operation of any law intended to reform the civil service of this city and substitute the "merit" in lieu of the "spoils" system were many. In the first place the latter had become thoroughly rooted in the very fiber of the political society. In the second place the party organization was

bitterly opposed to reform and has sought in every way to thwart its success. In the third place there were many legal and constitutional questions that were relied upon to harass the commission and postpone action on their part. But looking over the Chicago of the past and the Chicago of to-day for comparison, the most conservative must admit a marked advance both in efficiency of service and economy. The activity of the Civil Service Commission of the city of Chicago may be appreciated when we consider that under this law about 35,000 applications have been filed and about 22,000 examined. Of these about 13,000 were passed, and over 6,000 of this number have been certified for appointment.

The statement of the present commission (1) relative to its work is as follows:

Appointed May 3, 1897. Served eight months to date of report.

Examinations held.....	103
Applications filed.....	19,461
Applicants passed.....	8,136
Applicants certified (for appointment)...	4,176
Applicants given employment.....	3,758

In every city where adopted the merit system has proved successful, and as citizens we may hope that the day is not far distant when official appointments instead of being placed on a basis of "spoils" to parties, the object of predatory organization<sup>36</sup>, will be placed on a basis of "service to the public."

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<sup>36</sup> Cook county has also adopted the merit system of appointments, thus in a measure relieving this political organization from the effects of the "spoils" system.



## CHAPTER XIII.

## MODIFICATIONS OF LAW AS A RESULT OF POPULAR CO-OPERATION (2) RELATIVE TO THE EXERCISE OF THE OTHER FUNCTIONS OF GOVERNMENT.

As to the exercise of the other functions of government, the adaptations of our law for the protection of the people from spoliation have been many. In the first place the form of government adopted by the people of the United States, in so far as the exercise of executive and judicial functions are concerned, in a large measure, accomplished this. The contest had already been waged for centuries along this line; the independence of the colonies marked the successful issue of the conflict in the interest of the people. By the frame of government established here every precaution was taken, every provision made against arbitrary action on the part of these officials, that the experience of the past had dictated.

A legal fiction was employed which assigned to executive and judiciary delegated powers only,<sup>1</sup> while the legislature, composed of chosen representatives of the people, was deemed to have the residuary powers, i. e., those powers not expressly or impliedly given to the executive and judiciary, or by express limitation reserved to the people themselves. In the subsequent exercise of sovereign powers, therefore, we find that those functions which the predatory group have been able to control in their own behalf have been largely legislative. The

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<sup>1</sup> The constitutional provisions for elections were limitations on the appointing power.

institutional adaptations of the century have been chiefly along this line.

The legislature is essentially a law-making body. It is designed to meet from time to time to revise and modify the established order in such a manner as to adapt this order to the changing conditions of the people. Its functions do not require constant attendance and continuous activity as do the functions of adjudication and administration. They are essentially deliberative. Deliberation demands that they hold in mind the social, economic and political conditions; that they act in the interest of the whole body politic. In order to secure these ends it is necessary that each member have full knowledge of all legislative acts as well as of the interests to be affected thereby. That deliberation may be secured, the people in framing their constitutions have required:

1. That no law shall be passed except by bill,<sup>2</sup> thereby making it necessary to present all matters for consideration in open and formal manner. The bill, however, may be introduced in either house,<sup>3</sup> but must, thereafter, be introduced into the other, where it may be amended, altered or rejected,<sup>4</sup> and in case it is altered or amended, must again return to the first house for concurrence.

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<sup>2</sup> See Ala., Const. 1875, IV, 19; Ark., 1874, V, 21; Cal., 1880, IV, 15; Colo., 1876, V, 17; Ind., 1851, IV, 1; Ia., 1857, III, 15; Kans., 1859, II, 20; Md., 1867, II, 29; Mo., 1875, IV, 25; Neb., 1875, III, 10; Nev., 1864, IV, 23; N. Y., 1846, III, 14; Penn., 1874, III, 1; Tex., 1876, III, 30; Wis., 1848, IV, 17.

<sup>3</sup> See Cal., 1880, IV, 15; Fla., 1868, IV, 12; Ill., 1870, IV, 12; Ind., 1851, IV, 17; Me., 1820, IV, 3; Md., 1867, III, 27; Miss., 1869, IV, 23; Mo., 1875, IV, 26; Neb., 1875, III, 9; Nev., 1864, IV, 16; N. Y., 1846, III, 13; Ore., 1851, IV, 19; Ohio, 1851, II, 15; S. C., 1868, II, 18; Tenn., 1870, II, 17; Tex., 1876, III, 31; Vt., 1793, Am. 3; Va., 1870, V, 9; W. Va., 1872, VI, 28.

<sup>4</sup> See Id., Ala., Ark., Cal., Col., Fla., Ill., Ind., Ia., Kans., Me., Md., Mo., Neb., Nev., N. Y., Ohio, Ore., Penn., S. C., Tenn., Tex., Va., W. Va., Wis.

2. That every bill must be read three different times on three different days in each house.<sup>5</sup>

3. Some of the State constitutions also require that no bill shall be passed till it shall have been referred to a committee and reported therefrom,<sup>6</sup> and all of them have made provision by rules for the careful consideration of bills in committees.

In order to secure knowledge of the condition of the State as a basis for deliberation provisions are made:

1. Requiring the executive at the commencement of each session of the legislature or from time to time to give information by message of the condition of the State and to recommend such measures as he may deem expedient.<sup>7</sup>

2. Providing means whereby the governor may be informed as to the state of affairs. To the end that he may have the necessary information the constitutions have given the governor power to require information in writing from the officers of the executive and adminis-

<sup>5</sup> Ala., 1875, IV, 21; Ark., 1874, V, 22; Cal., 1880, IV, 15; Colo., 1876, IV, 22; Fla., 1868, IV, 15; Ga., 1877, III, 7, Ill., 1870, IV, 13; Ind., 1851, IV, 18; Ky., 1850, IV, 29; La., 1879, 37; Mich., 1850, IV, 19; Minn., 1857, IV, 20; Miss., 1869, IV, 23; Mo., 1875, IV, 26; Nev., 1864, IV, 18; N. J., 1844, IV, 4; Ohio, 1851, III, 16; Ore., 1857, IV, 19; Penn., 1873, III, 4; S. C., 1868, II, 21; Tenn., 1870, II, 18; Tex., 1876, III, 32.

<sup>6</sup> See Ala., 1875, IV, 20; Colo., 1876, V, 20; La., 1879, 37; Mo., 1875, IV, 27; Penn., 1873, III, 2; Tex., 1870, III, 37.

<sup>7</sup> See Ala., 1875, V, 11; Ark., 1874, VI, 8; Cal., 1886, V, 10; Colo., 1876, IV, 8; Conn., 1818, IV, 8; Del., 1831, III, 11; Fla., 1868, V, 9; Ga., 1877, V, 1; Ill., 1870, V, 7; Ind., 1851, V, 13; Ia., 1857, IV, 9; Kans., 1859, I, 5; Ky., 1850, III, 12; La., 1879, VII, 1; Me., 1820, V, 1; Md., 1867, I, 19; Mich., 1850, V, 8; Minn., 1857, V, 4; Miss., 1869, V, 8; Mo., 1875, V, 9; Neb., 1875, V, 7; Nev., 1864, V, 10; N. J., 1844, V, 6; N. Y., 1846, IV, 4; N. C., 1868, III, 5; Ohio, 1851, III, 7; Ore., 1857, V, 11; Penn., 1874, IV, 11; S. C., 1868, III, 15; Tenn., 1870, III, 18; Tex., 1876, IV, 9; Va., 1870, IV, 5; W. Va., 1872, IV, 5; Wis., 1848, V, 4.

trative departments upon any subject relating to the duties of their respective offices.<sup>8</sup>

3. The provision, under our system, whereby the legislature has full power to appoint committees and provide other means of making inquiry into all subjects, these committees having, under statute, the same power as a court or a grand jury, to subpoena witnesses, to compel attendance, to adduce evidence under oath, etc. This is one of the most valuable means of gaining information, and one which will be constantly more employed as our system becomes more special and complex.

The whole legislative procedure framed under these constitutional requirements conserves the same end. It is customary when a bill is introduced to read it first by title, in order that notice may be given of its introduction and subject matter. The second reading is in full, and is regularly had on another day. After the second reading it is commonly referred to a committee, where it may receive the fullest and most informal consideration and discussion. This committee may be a regular standing committee, or a special committee, and its meeting either public or secret. Very commonly arguments from those whose interests might be affected are heard pro and con. The committee may report favorably or unfavorably, or not reporting, may be compelled so to do by order of the house. Upon motion, the report coming up for consideration, it is read, and any amendments proposed.<sup>9</sup> Upon the closing of the debate the third read-

<sup>8</sup> See Ala., 1875, V, 9; Ark., 1874, VI, 7; Cal., 1880, V, 6; Colo., 1876, IV, 8; Conn., 1818, IV, 6; Del., 1831, III, 10; Fla., 1860, V, 5; Ga., 1877, V, 1; Ill., 1870, V, 21; Ind., 1851, V, 15; Ia., 1857, IV, 8; Kans., 1859, I, 4; Ky., 1850, III, 11; La., 1879, 70; Me., 1820, V, 1; Mich., 1850, V, 5; Minn., 1857, V, 4; Miss., 1869, V, 6; Mo., 1875, V, 22; Neb., 1875, V, 22; Nev., 1864, V, 6; N. C., 1868; Ohio, 1851, III, 6; Ore., 1857, V, 13; Penn., 1874, IV, 10; S. C., 1868, III, 14; Tenn., 1870, III, 8; Tex., 1876, IV, 24; Va., 1870, IV, 6; W. Va., 1872, VI, 8.

<sup>9</sup> See Ala., 1875, IV, 19; Ark., 1874, V, 21; Colo., 1876, V, 17; Mo., 1875, IV, 26; Penn., 1873, III, 1; Tex., 1876, III, 31.

ing of the bill is had in full.<sup>10</sup> After passing one house in this manner it is then sent to the other, where the same proceedings are had before passage there. If amendments are made, then it must be returned to the first chamber and the process continued till, in the regular form, there has been a concurrence of both houses on the measure. It is then sent to the executive, who must also pass on the bill, or, failing to approve, return it with his objections to the house in which it originated. This again requires reconsideration and amendment, or in case the legislature wishes to pass the measure over the veto of the executive, two-thirds vote of all the members of each house in the affirmative is usually required.

Various constitutional prescriptions are also made to prevent surprise, deception and fraud, such as:

1. That no bill shall relate to more than one subject and that this shall be expressed in the title.<sup>11</sup>
2. That no bill can become a law unless on its final passage a majority in each house shall vote in the af-

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<sup>10</sup> In N. Y. (Const. 1894, VI, 15) the rule is that the bill as a whole must be read the next day after consideration in the committee of the whole. For reason ascribed in the constitutional convention for adopting this rule see Vol. I, Debates of Convention, 1894, p. 246.

<sup>11</sup> See Ala., 1875, IV, 2; Cal., 1880, IV, 24; Colo., 1876, V, 21; Fla., 1868, IV, 14; Ga., 1877, III, 7; Ill., 1870, IV, 13; Ind., 1851, IV, 19; Ia., 1857, III, 29; Kans., 1859, II, 16; Ky., 1850, II, 37; La., 1879, 29; Md., 1867, III, 29; Mich., 1850, IV, 20; Minn., 1857, IV, 27; Mo., 1875, IV, 28; Neb., 1875, III, 11; Nev., 1864, IV, 17; N. J., 1844, IV, 7; Ohio, 1851, III, 16; Ore., 1857, IV, 20; Penn., 1873, III, 3; S. C., 1868, II, 20; Tenn., 1870, II, 17; Tex., 1876, III, 35; Va., 1870, V, 15; W. Va., 1872, VI, 30.

The reason for such provisions is found in the experience of the people. Some of the most high-handed measures had, prior to the incorporation of such provision, been saddled upon the public by designing individuals, who secured their passage by misrepresentation in the titles of the acts. The titles and all exterior evidences of content would indicate one subject, perhaps quite laudable in itself, while in some of the sections of the *bill* a wholly different subject of legislation would appear.

firmative, and in most of the constitutions this majority is defined: In some a majority of those present<sup>12</sup> is sufficient, or of "each house,"<sup>13</sup> but most of them require a majority of those elected.<sup>14</sup>

3. In order that this last provision may be enforced, a large number of the State constitutions require the ayes and nays to be entered on the journal, so that the record will show that the constitutional requirement has been complied with.<sup>15</sup>

4. That no law should be revised, altered or amended "by reference" to its title only; but the act revised and sections altered or amended must have been enacted and published "at length."<sup>16</sup> Or, as in New York and New Jersey, that no act should be passed which should provide that any existing law or part thereof should be made

<sup>12</sup> See Fla., 1868, IV, 15.

<sup>13</sup> See Ala., 1875, IV, 21; Ark., 1874, V, 22.

<sup>14</sup> See Cal., 1880, IV, 15; Colo., V, 22; Ga., III, 7; Ill., 1870, IV, 12; Ind., 1851, IV, 25; Ia., 1857, II, 17; Kans., 1859, II, 13; La., 1879, 37; Md., 1867, III, 28; Mich., 1850, IV, 19; Minn., 1857, IV, 13; Mo., 1875, IV, 31; Neb., 1875, III, 10; Nev., 1864, IV, 18; N. J., 1844, IV, 4; N. Y., 1846, III, 15; Ohio, 1851, II, 9; Ore., 1857, IV, 25; Penn., 1874, III, 4; Tenn., 1870, II, 18.

<sup>15</sup> See Ala., 1875, IV, 21; Ark., 1874, V, 22, and Id., Cal., Colo., Ga., Ill., Ia., Kans., Md., Mich., Minn., Mo., Neb. Nev., N. J., N. Y., Ohio, Penn., Tenn.

The presumption being in favor of the validity of an act of the legislature, and the regularity of proceedings after an act had been duly authenticated, there was no means of preventing an act being passed without even a quorum being present unless question was raised or the ayes and nays demanded at the time of the passage. Therefore in order to protect the State against such a use of power, these provisions were made requiring the record to show the majority prescribed by the constitution.

<sup>16</sup> See Ala., 1875, IV, 2; Ark., 1874, V, 23; Cal., 1880, IV, 24; Colo., 1876, V, 28; Fla., 1868, IV, 14; Ill., 1870, IV, 13; Ind., 1851, IV, 21; Kans., 1859, II, 16; La., 1879, 30; Md., 1867, III, 29; Mich., 1850, IV, 25; Mo., 1875, IV, 33; Neb., 1875, III, 11; Nev., 1864, IV, 17; N. J., 1844, IV, 7; Ohio, 1851, II, 16; Ore., 1857, IV, 22; Penn., 1873, III, 6; Tex., 1876, III, 36; Va., 1870, V, 15; W. Va., 1872, VI, 30.

or deemed a part of the act or be applicable except by inserting it in such act.<sup>17</sup>

5. Limitations on the power of legislature to make laws of resolution.<sup>18</sup>

6. Provisions limiting the time within which bills may be introduced.<sup>19</sup>

7. Provisions prohibiting the consideration of a bill once defeated, at the same session.

8. Prescriptions as to manner of voting, for a division, for a count by tellers when demanded by one-fifth of members, and that final vote shall be by ayes and nays.

9. Provisions for enrollment of bills after their passage providing for verification of correctness by joint committee on "Enrolled Bills," and the adoption of the enrollment by each house.

10. Laws governing the affixing of the signature of the speaker of each house and of the executive.<sup>20</sup>

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<sup>17</sup> N. Y., 1846, III, 17; N. J., 1844, IV, 7.

In others, all acts which repeal, revise or amend former laws shall recite in their caption or otherwise the substance of the act repealed or revised.

These provisions were adopted to protect the people from the amendment, modification, repeal or revival of acts by fraud and deceit; they likewise had the effect of making the body of the law more easily understood than when amended by reference.

<sup>18</sup> See Willard's Leg. Handbook, p. 236, et seq. This limitation applies with especial strictness in appropriations (*Id.*, p. 128) in covering indebtedness (*Id.*, p. 130), payment of legislative employes (*Id.*, p. 131), etc.

<sup>19</sup> In Colorado, Const. 1876, V, 19, it is provided that "No bill except the general appropriation bill for the expenses of the government only, introduced into either house of the general assembly after the first twenty-five days of the session shall become a law." In others fifty days is the limit. In Maryland, not within the last ten days, and in Indiana none can be presented to the governor within the last two days.

<sup>20</sup> These restrictions on the legislature and prescriptions for their action have grown out of certain abuses that in many cases were in most flagrant violation of official trust. As, for example, the presenting of a bill to a speaker for signature before it was passed by the legislature, foisting it upon the State without remedy, the legislature having adjourned before it was

In order that a greater degree of responsibility may be insured, that a greater degree of publicity might be given to public acts, and that the people may be able to locate the responsibility with greater accuracy and ease, constitutional provisions have been adopted:

1. Requiring a journal of proceedings to be kept and published.<sup>21</sup>
2. Prescribing that the doors of the legislature shall be open and that the proceedings shall be public.<sup>22</sup>
3. That all voting shall be *viva voce*.<sup>23</sup>
4. That the ayes and nays shall be entered in the journal published.<sup>24</sup>

In order that the public may have ample notice of any change made in the established order by the legislature, many of the constitutions have provisions to this end.<sup>25</sup>

discovered, the changing of words in a law to give it a different meaning as it was being enrolled, the introducing of bills at the last of a session and rushing them through without time for knowledge of the contents.

<sup>21</sup> "That a journal shall be kept" is required by all of the constitutions except that of Mass., and all of these except Oregon require that the same be published. About fifteen of the States, however, except those proceedings which require secrecy.

<sup>22</sup> See Ala., 1875, IV, 15; Ark., 1874, V, 13; Cal., 1880, IV, 13; Colo., 1876, V, 14; Conn., 1818, III, 11; Del., 1831, II, 9; Fla., 1868, IV, 11; Ill., 1870, IV, 10; Ind., 1851, IV, 13; Ia., 1857, III, 13; Md., 1867, III, 21; Mich., 1850, IV, 12; Minn., 1857, IV, 19; Miss., 1869, IV, 15; Mo., 1875, IV, 19; Neb., 1875, III, 8; Nev., 1864, IV, 15; N. H., 1792, II, 8; N. Y., 1846, III, 11; Ohio, 1851, II, 13; Ore., 1857, IV, 14; Penn., 1873, II, 13; S. C., 1868, II, 27; Tenn., 1870, II, 22; Tex., 1876, III, 16; Vt., 1893, II, 13; Wis., 1848, IV, 10.

<sup>23</sup> Provisions requiring "ayes and nays" carry this with them.

<sup>24</sup> These provisions have a double purpose of insuring a quorum and giving publicity to the acts of members.

<sup>25</sup> The lack of notice of changes in law was one of the greatest faults of government and one of the last to be corrected. In Germany there is not any provision made for this yet, and some of our States suffer materially on this account. During the sitting of the legislature in such States as these no man may know what the order of society is nor how to conduct himself and his business in a lawful manner. Most of our States have provided for this.



In some the laws do not go into effect till published, but take effect immediately thereafter;<sup>26</sup> in Louisiana on the day of publication in the place where the State journal is published and twenty days thereafter in other places; in Tennessee on the fifteenth day after final passage;<sup>27</sup> in Mississippi on the sixteenth day after; in others on the ninetieth day after the end of the session,<sup>28</sup> while others prescribe a certain day after the session. But notice is provided for in many other States where the effect of the act is not made to depend on publication.

## II.

But constitutional provisions adopted for the purpose of securing legislative deliberation and the proper knowledge of the political and economic conditions, for preventing surprise, deception and fraud, fixing responsibility for official acts, and giving timely notice of changes in the law—all of these have to do with the manner of procedure. They are guaranties established for the purpose of securing the conditions necessary for wholesome legislation. The constitutional provisions adopted as a means of protecting the people against the exercise of the legislative functions of government for predatory ends are quite as significant. These have to do with the subject-matter of legislation. They are imposed for the purpose of limiting the powers of the legislature, of placing such checks on the exercise of these powers as to lessen the inducement to predatory activity, of reducing the quantum of "spoils" obtainable through the control of the legislative functions. Among the subjects of legislation upon which these limitations have been imposed are the following:

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<sup>26</sup> See Ind., 1851, IV, 28; Wis., 1848, VII, 21.

<sup>27</sup> Cons. 1870, II, 20.

<sup>28</sup> See constitutions of Mo., Mich., Neb., Ore., Tex., W. Va.

I. APPROPRIATIONS.—The first restrictions imposed by our constitutions on the power of appropriations was, that revenue bills should originate in the House of Representatives.<sup>29</sup> This restriction had a historic foundation that gave it great force in England, but when adopted here was found to be wholly unnecessary, and therefore an incumbrance. The tendency for a long time has been to abandon it. All other restrictions, however, have grown out of conditions present and have proved to be well adapted to our needs. One of the most important of these is the requirement that “no money shall be paid out the treasury except upon appropriations duly made by law.”<sup>30</sup> This was primarily a limitation upon the executive and administrative departments, but it has also had great force in legislation by way of laying the foundation for other limitations. Owing to the provisions requiring “appropriations by law” various restrictions on the legislative power have been made possible, such as: “The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and the judicial departments of the State.”<sup>31</sup> In several States expense

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<sup>29</sup> Ala., 1875, IV, 31; Colo., 1876, V, 31; Del., 1831, II, 18; Ga., 1877, III, 7; Ind., 1851, IV, 17; Ky., 1850, II, 30; La., 1879, 35; Me., 1820, IV, 3; Mass., 1780, II, 1; Minn., 1857, IV, 10; Neb., 1875, III, 9; N. H., 1792, III, 18; N. J., 1844, IV, 6; Ore., 1851, IV, 18; Pa., 1874, III, 4; S. C., 1868, II, 18; Tex., 1876, III, 33; Vt., 1793, Am. 3.

<sup>30</sup> Ala., 1875, IV, 33; Ark., 1874, V, 29; Cal., 1873, IV, 13; Colo., 1876, V, 14; Del., 1831, II, 15; Fla., 1868, IV, 16; Ga., 1877, III, 7; Ill., 1870, IV, 17; Ind., 1851, X, 3; Ia., 1857, III, 24; Kans., 1859, II, 24; Ky., 1850, VIII, 5; La., 1879, IV, 3; Me., 1820, V, 4; Md., 1867, III, 32; Mich., 1850, XIV, 5; Minn., 1857, IV, 12; IX, 9; Miss., 1869, IV, 26; Mo., 1857, IV, 43; Neb., 1875, IV, 19; Nev., 1864, III, 22; N. J., 1844, IV, 6; N. Y., 1846, VII, 8; N. C., 1868, XIV, 3; Ohio, 1851, II, 22; Ore., 1851, IX, 4; Penn., 1874, III, 16; S. C., 1868, II, 22; Tenn., 1870, II, 24; Tex., 1876, XIII, 6; Vt., 1793, II, 17; Va., 1870, X, 10; W. Va., 1872, X, 3; Wis., 1848, VIII, 20.

<sup>31</sup> Ark., 1874, V, 30; Ala., 1875, IV, 32; Colo., 1876, V, 32; Ga., 1877, III, 7; Penn., 1873, III, 15.

for public schools may be included in the general appropriation bill.<sup>32</sup> In some the interest on the public debt,<sup>33</sup> the sinking fund,<sup>34</sup> etc. Specific provisions are also made for the inclusion of salaries of State officers generally,<sup>35</sup> of the legislature,<sup>36</sup> the "civil list"<sup>37</sup> cost of collecting the revenue,<sup>38</sup> support of institutions under State control and management,<sup>39</sup> support of eleemosynary institutions, etc.<sup>40</sup>

"All other appropriations<sup>41</sup> are required to be made by separate bills, each embracing but one subject."<sup>42</sup> In one State<sup>43</sup> the general appropriation must be made first and is given precedence over all others.<sup>44</sup>

In order to give publicity to these acts it is provided by the constitutions of most of the States that a regular statement of receipts and expenditures of public moneys must be published. In two this report must be made every three months;<sup>45</sup> in others annually;<sup>46</sup> in a few

<sup>32</sup> Ala., 1875, IV, 32; Colo., 1876, V, 32; Ia., 1877, III, 7, 9; La., 1879, 53; Mo., 1875, IV, 43; Penn., 1873, III, 15.

<sup>33</sup> Ala., 1875, IV, 32; Colo., 1876, V, 32; Ga., 1877, III, 7, 9; La., 1879, V, 3; Mo., 1875, IV, 43; Penn., 1873, III, 15.

<sup>34</sup> Mo., 1875, IV, 43.

<sup>35</sup> Colo., 1876, V, 32; Fla., 1868, IV, 30; Ill., 1870, IV, 16; Neb., 1875, III, 19; Ore., 1857, IX, 7; W. Va., 1872, VI, 42.

<sup>36</sup> Mo., 1875, IV, 43.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Cal., 1873, IV, 16; Ga., 1877, III, 7, 9.

<sup>40</sup> La., 1879, 53; Mo., 1875, IV, 43.

<sup>41</sup> That is, all appropriation bills other than those included in the general appropriation bill.

<sup>42</sup> Penn., 1873, III, 15; La., 1879, 53; Ga., 1877, III, 7, 9; Colo., 1876, V, 32; Cal., 1880, IV, 34; Ark., 1874, V, 30; Ala., 1875, IV, 32.

<sup>43</sup> Mo., 1875, IV, 43.

<sup>44</sup> This probably grew out of the "carpet-bag" experiences subsequent to the war.

<sup>45</sup> Ga., 1877, III, 7; La., 1879, 43.

<sup>46</sup> Ala., 1875, IV, 33; Ky., 1850, VIII, 5; N. C., 1868, XIV, 3; S. C., 1868, II, 22; Tex., 1876, XVI, 6; W. Va., 1872, X, 3.

every two years;<sup>47</sup> in several at or after each session of the legislature, with the laws,<sup>48</sup> while others prescribe that these reports shall be made "in such manner as by law directed."<sup>49</sup> In Indiana and Oregon no special act making compensation to a person claiming damages against the State can be passed. In Maryland the legislature can appropriate no money in payment of a private claim over \$300, unless proved before the comptroller and reported on by him. In New York, Michigan and Virginia the legislature cannot audit or allow any private claim or account. The constitution of Illinois provides that the legislature shall make no appropriations of money out of the treasury by any private law; and in Texas that no appropriation for private or individual purposes shall be made. In several of the States<sup>50</sup> no appropriation of money or grant of property can be made by the State to any individual or corporation, municipal or other.<sup>51</sup>

In several of the States the legislature cannot authorize the payment of any claim against the State under an agreement or contract made without the authority of law.<sup>52</sup> In some this is extended to municipalities also.<sup>53</sup>

<sup>47</sup> See Del., 1831, II, 15.

<sup>48</sup> Cal., 1873, IV, 22; Fla., 1868, XII, 5; Ga., 1877, III, 7; Ill., 1870, IV, 17; Ind., 1851, X, 4; Ia., 1857, III, 18; Me., 1820, V, 4; Md., 1867, III, 32; Mich., 1857, IX, 11; Neb., 1875, III, 22; Nev., 1864, IV, 19; Ore., 1857, IX, 5; S. C., 1868, IX, 11; Tenn., 1870, II, 24; Vt., 1793, II, 28; Va., 1870, X, 18.

<sup>49</sup> See Ark., 1874, XIX, 12; Conn., 1818, IV, 21; Kans., 1859, XV, 5; Mo., 1875, X, 19; Tex., 1876, VIII, 6.

<sup>50</sup> Ga., 1877, VII, 16; La., 1879, 56; Mo., 1875, IV, 46; Neb., 1875, III, 18; N. J., 1844, I, 20; Tex., 1876, III, 51.

<sup>51</sup> These provisions arose, no doubt, as also those set forth on pages 321, 2 and 4, from the practice that had been in vogue whereby valuable properties and rights or monies had been procured from the government by individuals and corporations through the employment of State agencies in their own behalf.

<sup>52</sup> Ala., 1875, IV, 28; Cal., 1873, IV, 32; Ill., 1870, IV, 19; La., 1879, 45; Mo., 1875, IV, 48; Tex., 1876, III, 53; W. Va., 1872, X, 3.

<sup>53</sup> Cal., 1873, IV, 32; La., 1879, 45; Tex., 1876, III, 53.

In others again money cannot be paid on any claim the subject-matter of which is not provided for by the existing laws.<sup>54</sup>

One of the most recent and most effective means of guarding the interests of the people and the treasury against invasion, through the legislature, is that of "the executive veto of specific items" of appropriation bills. By this means the executive can effectively check all "log rolling" schemes. He can veto such items as appear to him unwise or adverse to public interest and leave the other items stand. He is made the guardian of the treasury and is held responsible for the performance of his trust.<sup>55</sup>

2. TAXATION.—This is one of the most important and at the same time least understood subjects with which publicists and people have to do. Its theories are most involved, its laws most diverse and its administration is most uncertain and inequitable. The unsettled policy of our law, the lack of unanimity in popular thought, the incompetency and subservience of the administrative forces under the "spoils" system are conditions which have rendered evasion and spoliation easy. Our whole system of taxation is ill-advised and ill-adapted to the best results. In the first place, the division of taxing power between Federal and State authority is ill-adjusted. To the Federal government has been granted "power to lay and collect taxes, duties, imposts and excises." "Duties, imposts and excises" are the most fruitful means of raising a revenue known to modern government. These have been put into the hands of the Federal government, while the chief burdens of government have been imposed on the States. Having

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<sup>54</sup> Ark., 1874, V, 27; Colo., 1876, V, 27; Ia., 1857, III, 31; La., 1879, 45; Nev., 1864, IV, 28; Ohio, 1851, II, 27; Penn., 1873, III, 11; Tex., 1876, III, 44.

<sup>55</sup> See post, page 417, for further discussion of this subject.

handed over to the National government the best sources of revenue, we have relieved it of those functions which require the greatest expenditure. Aside from the expenses incurred for military purposes, the expenditures for National government have been comparatively small.<sup>56</sup> This enormous taxing power of the National government, placing in its hands large revenues which are easily collected, furnishes one of the best means of political spoils. On the other hand, the States cannot raise the revenues needed for administration without placing very serious burdens on the people. We have a system of National waste and State burden. In the second place, the conflict of Federal and State law allows of numerous evasions of the just burdens of government, as by quasi-public corporations, etc. In the third place, there is no continuity of administration in the several States. Each school district, town, county and State is independently organized so far as taxation is concerned. There is no means provided for systematic and equitable financial administration. In the fourth place, there has been no sufficient check on assessment, such as would preclude those having large properties from procuring estimates favorable to themselves and adverse to equitable taxation. In fact, under the present system it has been the aim of individuals, towns, counties and all other tax units to falsify the records in such a manner as to relieve themselves of the burdens of State and impose them on others.

Many constitutions provide that taxation shall be equal and uniform throughout each State or local subdivision levying a tax.<sup>57</sup> This is the announcement of the prin-

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<sup>56</sup> It has been estimated that 90 per cent. of the national expenditures have been, directly or indirectly, for military purposes.

<sup>57</sup> Ark., 1874, XVI, 5; Colo., 1876, X, 3; Fla., 1868, XII, 1; Ga., 1877, VII, 2; Ind., 1851, X, 1; Kans., 1859, XI, 1; La., 1879, 203; Mich., 1850, XIV, 11; Minn., 1857, IX, 1; Miss., 1869,

ciple. Pursuant thereto other constitutional provisions have been made, such as the following: All taxes levied shall be assessed in exact proportion to the value of the property;<sup>58</sup> every member of society is bound to contribute his portion to the expenses of government; but no part of his property can be taken without his own consent or legislative authority;<sup>59</sup> no tax, impost, duty or charge can be levied except in pursuance of a law;<sup>60</sup> every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose.<sup>61</sup>

The modifications of our statute law relative to taxation are neither satisfactory nor, at present, well adapted to the economic conditions of our society. It is well known to the student of finance that the basis of taxation has always been determined by the ruling force in the State;<sup>62</sup>

XII, 20; Mo., 1875, X, 3; Nev., 1864, X, 1; N. J., 1844, IV, 7; N. C., 1868, V, 3; Ohio, 1857, I, 32; S. C., 1868, IX, 1; Tenn., 1870, II, 28; Tex., 1876, VIII, 1; Va., 1870, X, 1; W. Va., 1872, X, 1; Wis., 1848, VIII, 1.

<sup>58</sup> Ala., 1875, XI, 1; Ark., 1874, XVI, 5; Cal., 1873, XIII, 1; Ga., 1877, VII, 2; Ind., 1851, IX, 1; La., 1879, 203; Me., 1820, IX, 8; Mass., 1780, II, 1; Mich., 1850, XIV, 12; Minn., 1857, IX, 1; Miss., 1869, XII, 20; Mo., 1875, X, 4; Neb., 1875, IX, 1; N. J., 1844, IV, 7; N. C., 1868, V, 3; Ore., 1857, IX, 1; S. C., 1868, I, 36; Tenn., 1870, II, 28; Tex., 1876, VIII, 1; Va., 1870, X, 1; W. Va., 1872, X, 1.

<sup>59</sup> Mass., 1780, I, 10; N. H., 1792, I, 12; Md., 1867, Dec. of R., 14, 15; S. C., 1868, I, 36-7; Vt., 1793, I, 9; Va., 1870, I, 8.

<sup>60</sup> Ark., 1874, XVI, 11; Fla., 1868, XII, 3; Kans., 1859, XI, 4; Mo., 1875, X, 1; Ohio, 1851, XII, 5; Ore., 1857, IX, 3; S. C., 1868, IX, 4.

<sup>61</sup> Ark., 1874, XVI, 11; Ia., 1857, XII, 7; Kans., 1859, XI, 4; Mich., 1850, XIV, 14; N. Y., Am., 1874-5, Art. 3, Sec. 20; N. C., 1876, V, 7; N. Dak., 1889, 175; Ohio, 1851, XII, 5; Ore., 1857, IX, 3; S. C., 1868, IX, 4; S. Dak., 1889, XI, 8; Va., 1870, X, 16; Wash., 1889, VII, 5; Wyo., 1889, XV, 13.

<sup>62</sup> During the reign of feudalism, and under the worst forms of absolutism, those who were too weak to resist were taxed. The power to resist exaction was the means by which the industrial classes obtained recognition and an equitable *apportionment* of tax burdens.

that ideals of justice in taxation have been such as to conserve the economic interest of those in control of the government. When the State is ruled by certain classes these classes adopt such a theory as will shift the burden of taxation to others.<sup>63</sup> When the government becomes democratic and is controlled by a majority, then the economic interest of the majority becomes the rule of conscience; the political power becomes shifted from property to persons, and the wealthy classes, being in the minority, the theory that taxes should be paid in

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<sup>63</sup> History is full of examples of this kind. The occurrence is so general that it can be stated as a rule. When the landed nobility ruled, the taxes were imposed on others. When the merchant princes became strong enough to resist they were given a place in government and the tax burdens were so adjusted that the burdens fell on the less powerful. Indirect taxes, such as customs duties, excises, etc., were represented as being most just, because by this means the burdens fell on the consumer. All being consumers, these were held to be a general tax on expense. In England, immediately prior to the year 1688, most of the revenues derived from taxation were "hearth money," and those derived from articles consumed, including (1) the old subsidy—5 per cent on the value of goods as rated in 1660; (2) tonnage on wines; (3) the duty on woolen cloth; (4) the specific duties on wine, tobacco and sugar, French and India linen, silks, brandy, etc.; (5) the hereditary excise on beer and other liquors, and (6) the temporary excise granted during the life of the sovereign. (See Dowell on the History of Taxation and Taxes in England, Vol. II, pp. 17-37.) These taxes were most burdensome to the poor. After the revolution of 1688, a general tax on property having been imposed during the war, this form of taxation was for a time retained, but by 1702, the general government having become well settled in the hands of the three ruling estates, and these ruling estates comprising a very small proportion of the population, direct taxation resolved itself into (1) taxes on land, (2) on houses and windows, (3) on the trade of hawkers, (4) on the business of hackney coaches, (5) on burials, births and marriages, and (6) on bachelors (*Id.*, pp. 38-65), while taxation by customs, excises and stamp duties were increased and continued to increase under their rule till after the political reforms of the early part of the nineteenth century (*Id.*, pp. 239-300). After the enlargement of the political constituency in England the principle of taxation changed. With the admission of the "fourth estate," the common people, into political power, direct taxes became the principal source of revenue, and the principle of taxation according to ability was established.



proportion to the ability of the taxpayer is evolved.<sup>64</sup>

In America democracy found itself under peculiar conditions. The people, at the time of our National establishment, were unaccustomed to being heavily taxed; the National government was loaded with debt; the territory over which it exercised jurisdiction was undeveloped, the larger part being unsettled. While the new nation was poor in capital, it was rich in possibilities. Its natural resources offered great inducements for capital to enter. The most productive form of taxation, therefore, in fact the only one from which a large revenue could be realized at once, was the indirect form—a levy of customs duty on goods imported. The people being unused to heavy taxation, excises held out another fruitful source from which revenue could be easily derived. These two forms of taxation were utilized by the general government.<sup>65</sup> They were laid as a matter of necessity.

Indirect taxes being necessary and at the same time being undemocratic and inequitable, when levied on all commodities indiscriminately, attempts were made to levy them in such a manner that they would not violate the general welfare. To this end excises were laid on those articles adjudged to be luxuries, in order that these (the indirect) taxes might also, as far as possible,

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<sup>64</sup> The principle of taxation according to ability may be said to have been evolved from a desire on the part of the majority to shift the burdens of the state on the wealthy classes. But in so shifting the burden it becomes necessary to preserve some equitable basis—to so administer the tax laws as not to discourage the accumulation of capital necessary to the economic welfare of the community. To discourage accumulation and to tax savings inordinately would be injurious to the welfare of the majority. Capital being a necessary factor, democratic society has sought to so adjust the tax burdens that they shall be equitable. The working out of a tax system according to the ability of the various members of society to bear the burdens of state has been the problem, and in so far as successful, the achievement of the present century.

<sup>65</sup> It must also be held in mind that the general government was an experiment and the people of the several States were very slow to yield the exercise of too much direct power.

conform to the democratic principle of payment according to ability; customs duties were so adjusted that capital would be induced to come in, and, coming in or being produced, would be employed in the development of the natural resources. A general tax laid on consumption in its very nature raises the prices of commodities consumed within the territory subject to the tax. This circumstance was utilized to the end desired. By laying duties on those articles which might be produced to advantage at home the price would be raised; the increased price would encourage the development of those resources from which such products were drawn. This was the policy adopted by the general government from the first, and, as a result, while large revenues have been raised by customs, they have aided in drawing capital to our shores and directing it along such lines of industrial employment that within a hundred years the United States has been transformed from a wilderness of undeveloped resources to an empire whose wealth is unsurpassed—whose resources are in a very high state of economic utility to the nation. Thus both forms of indirect taxation were made to conform, as far as possible, to ideals of general welfare.

No attempt has been made to justify indirect taxation on principles of equality. All parties have conceded that the burdens imposed by the customs, for example, have been unequal and, from the standpoint of "ability to pay," unjust. Customs duties were based on the principles of necessity and expediency—necessity as a revenue measure and expediency as a means of encouraging "infant industries." Since the time of the revolution we have been involved in three wars; at the present time we are engaged in another. Two of these wars have taxed the best resources of the nation to the utmost. When necessity has been present the tax has always been favored by a majority of the people; but with each relief from the

pressure of necessity the expediency of continuing the customs duties at an unduly high rate as a matter of protection has been denied.

By means of the high customs and excise duties the great debt of the civil war was so far reduced within the first decade that popular demands were made for a reduction to the basis of revenue necessity. From 1872 to 1896 the leading political issue between the dominant parties was based on the policies of "customs for revenue" and "customs for protection." That the plea for reduction to revenue necessity has had a large following appears from the fact that in every National election between these dates the popular vote has been adverse to a protective tariff which exceeds the necessities of the National government for revenue.<sup>66</sup> Under our system of presidential elections, however, the revenue party has been successful twice only, and each time conditions have been such as to prejudice a permanent policy of customs reduction.<sup>67</sup> It is no part of this treatise to go into the

<sup>66</sup> Votes cast for President:

	1876.	1880.	1884.	1888.	1892.
Democrat...	*4,300,590	*4,444,952	*4,874,986	*5,540,329	*5,556,543
Republican...	†4,036,298	†4,454,416	†4,851,981	†5,439,853	†5,175,582
Greenback...	‡ 81,737	‡ 308,578			
Ind. Dem.....			‡ 175,370		
Union Labor.....				‡ 146,935	
Populist.....					‡1,040,886
	*Tilden	*Hanc'k	*Clevel'd	*Clevel'd	*Clevel'd
	†Hayes	†Garfield	†Blaine	†Harrison	†Harrison
	‡Cooper	‡Weaver	‡Butler	‡Streator	‡Weaver

During this time the Democratic candidate received a plurality of votes in every election but one, that of 1880, in which the Republican candidate had a plurality of 9,464 votes, while General Weaver, the Greenback candidate, in the same election, received 308,578 votes, showing a large majority of the electors to be for tariff reduction.

<sup>67</sup> One of the causes which has operated to assist the ultra-protectionists has been the recurrence of panics and the consequent prostration of industry. The Cleveland administrations were associated with periods of industrial depression. This had the effect of raising up factions on the one hand and of furnishing a circumstance by which the demagogue and post

merits of the claims of one party or the other. It is for us only to observe the attitude of parties and people toward this form of taxation. To this end it may be well to notice certain conditions which, according to the doctrines advanced by both parties, require a modification of customs laws.

During the last two decades a large number of the protected industries have become so highly developed that not only can they operate successfully without tariff protection, but the tariff having cut off competition from without, they themselves, by combination, have prevented competition from within; the result has been that, as to these industries, the very object of the protective tariff, aside from its revenue feature, has been lost to the country at large, and as a revenue measure it is admittedly unjust.<sup>68</sup> By reason of the "trusts" organized under the protection of customs laws, the copper, lead, steel, nickel, coal, zinc products, in fact nearly all of the mineral products, have been controlled and the prices fixed by the trust managers at a rate just enough below the

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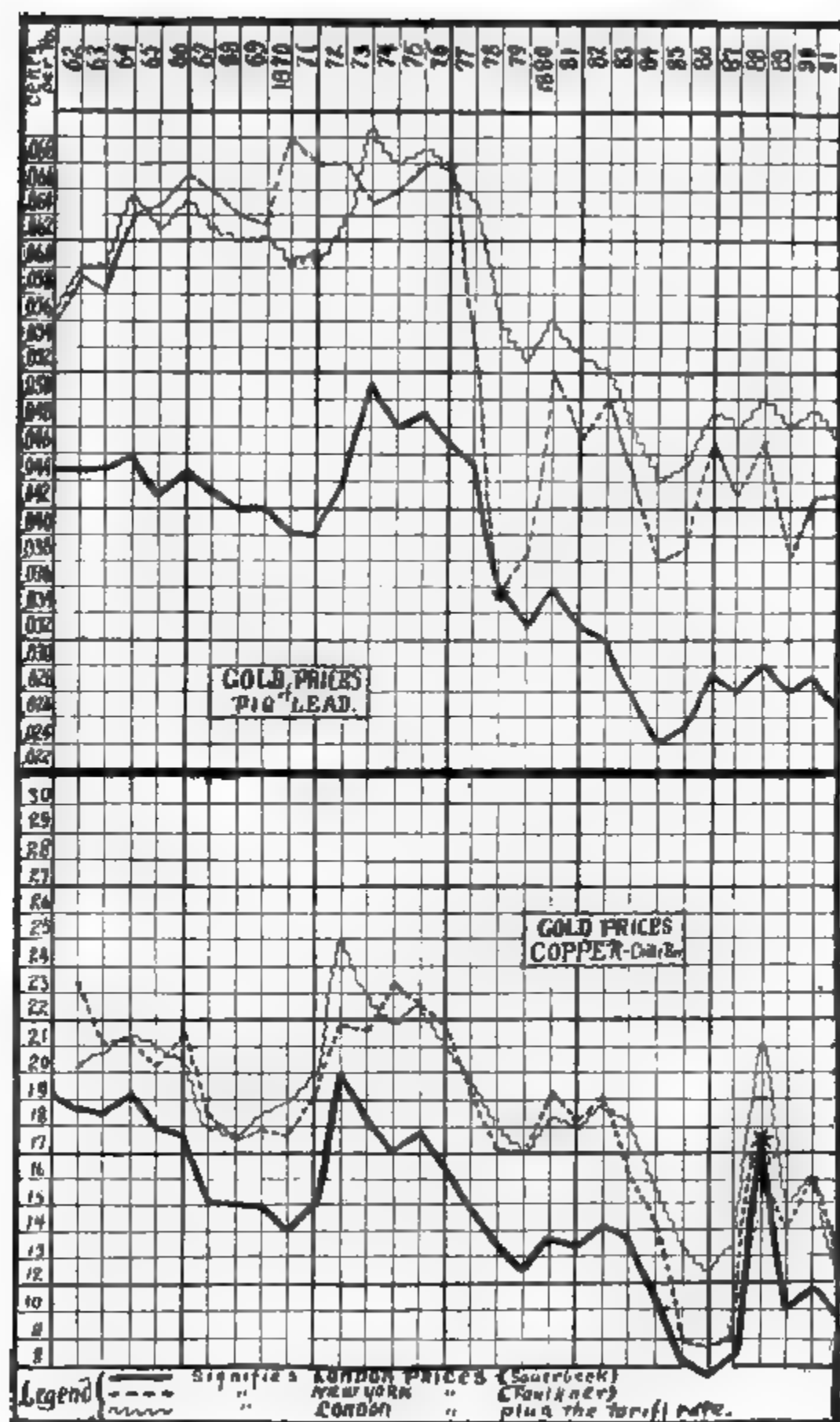
hoc reasoner could spin a web of sophistry to catch votes, on the other. If these had been the only times that depressions had occurred; if the great depression from '73-9 had not occurred in Republican administrations when the protective tariff had full sway, and if these depressions had not been world-wide, and been as severely felt in other lands where our tariff did not reach, in countries having high tariffs as well as those having free trade, the logic might have been more conclusive. Nevertheless such arguments have their influence.

<sup>68</sup> The theory on which the people have been induced to support the protective tariff is, that by encouraging the development of home industries the country would finally be able to supply the home demand and then, by competition, the price would be reduced to its normal level; that, while they would for a time contribute to the upbuilding of the "infant industries," that these industries, having been put on a solid, self-supporting basis, would finally be able to furnish goods at the same price for which they might be obtained from the foreign market; that at the same time the general industrial welfare would be conserved by their establishment; when, however, these establishments have grown so strong that they can control the home market, the tariff then becomes a menace to the interests of those who have contributed to the upbuilding of these concerns.

world's market plus the tariff, to enable them to take to themselves the fullest benefits of the monopoly and to deprive the consumers of a large part of the benefit of the industrial development which they have so long contributed to bring about. Every year the consumers are compelled to pay tribute to these "trusts" amounting to many times the sum of revenue derived by the government.

The operation of the tariff law relative to articles controlled by trusts is well illustrated in the prices of copper and lead, shown on the page opposite. The lower solid black line represents the London price of these articles, the upper waved line represents the London price plus the tariff rate, the dotted line represents the New York price. These are both commodities which are produced for export, our output far exceeding the home demand. On the principle of supply and demand, the theory on which the tariff on these articles was fixed, competition being free, the market price in the United States would be the London price, less freight and other costs of transportation. The mines from which these resources are drawn, however, are controlled by syndicates, which regulate the output and price to suit themselves. The protective tariff on these articles, by cutting off foreign competition, allows them so to do. The result is that a margin of tribute is drawn from the consumer. This margin is shown on the chart by the difference between the lower solid black line and the upper dotted line, to which should also be added the cost of transportation. It will be noticed that in 1877-8 there was a great fall in the New York price of lead, and that in 1888 there was a remarkable rise in both the New York and the London prices of copper, the London price rising above that of New York. No better illustration of the effects of monopoly rule can be found. In 1877-8 the monopoly in lead was interrupted, and in 1888 a French syndi-

Chart Showing the Effect of a Protective Tariff on Monopoly Products.



cate was formed which exercised the same influence on the foreign copper market that the American syndicate did on the home market. The result was that the price in the London market was at times higher than the price in New York, and the price level was raised the world over. But the French syndicate, after investing millions in copper, without the aid of a tariff, found itself unable to maintain its monopoly; the world's supply was too great for them to control. The consequent fall of prices forced them to the wall. While the London price resumed its normal level, after the breaking down of the foreign monopoly, the American syndicate, protected by the tariff, was enabled to levy the same margin of tribute as before. These effects clearly appear in the chart.

On investigation all of the American trust products will display the same result. The customs laws which secure these monopolies are most carefully guarded by those who enjoy them. Expensive lobbies are maintained at the National capital. Those who advocate protection to monopoly products and a continuance of these monopolies are well rewarded. Large sums for campaign purposes are placed at the disposal of the party managers and the best talent is employed to educate the popular mind—to convince the people that a maintenance of these tariffs is most beneficial. In order further to mislead the classes upon whom the heaviest burden of tribute falls the “politicians” and lobbyists have imposed high duties on imported agricultural produce. But, though these tariffs have been laid under conditions of production similar to those of the mineral products,<sup>69</sup> by reason

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<sup>69</sup> That is, the United States produces for the world market in both cases. In both cases the home supply is greater than the home demand. In both the market for the surplus has been abroad. The only difference is found in the fact that the mineral resources are such that they can be controlled by trust organizations, while the agricultural resources cannot be so controlled.

of the inability of the agriculturalists to combine and form a monopoly, the result has been quite different. Instead of the American price of agricultural products being above that of the European market, as in case of the mineral products which are controlled by monopolies, instead of it approximating the foreign price plus the tariff, we find that the tariff on farm products has had little or no effect. The United States producing a surplus, the price by free competition being fixed by the world's market instead of being controlled by the trust managers, the price in the United States has been that of the world's market less freight charges, costs and profits of handling. This fact is shown by the charts of prices of wheat and cotton on the page following. The solid black line, as before, indicates the London price, the wave line the London price plus the tariff, and the dotted line the New York price. In case of wheat we have also added a starred line, indicating Chicago prices, for the purpose of showing that the price in both New York and Chicago has varied with the London price less freight rates, costs and profits of handling.<sup>70</sup>

The people in four National elections have shown their disapproval of such a policy. On two of these occasions the elections were so managed that the popular will was not impressed on the policy of the government. In the last election the tariff issue was so commingled with others that Congress was controlled by those who were well disposed toward these monopolies, and rates on monopoly products, instead of being reduced or taken off, were raised to a higher level. Under the Dingley act a very large part of the "list" is made up of monopoly products, and the various trust organizations of the country have been given an increased margin of tribute.

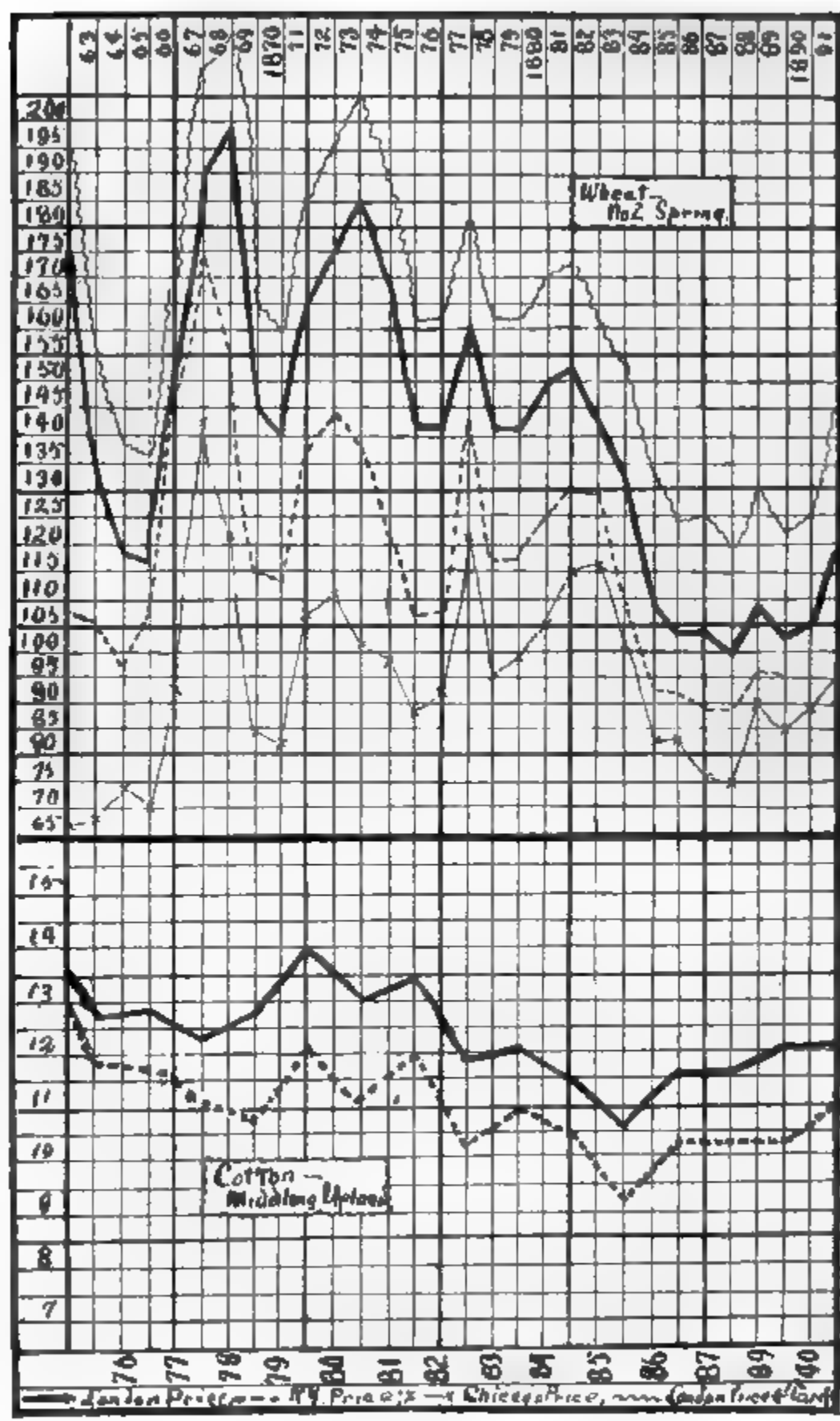
While customs duties laid on the basis of revenue

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<sup>70</sup> The convergence in these lines shows the decreasing cost of transportation.



Chart Showing the Inefficiency of a Tariff on Products Not Controlled by Monopoly where a Surplus is Produced.



necessity have always been supported by a majority of the people and while their imposition for purposes of protection has always received well-merited support, yet the protection and encouragement of trade monopolies, the legalizing of a levy of tribute on the weak for the benefit of the strong, is supported by the principles of neither party, is undemocratic, unjust—a condition of things wholly incompatible with the maintenance of free institutions.

These conditions cannot long exist. The people demand that taxation for the benefit of established monopolies shall come to an end. Though this popular demand has heretofore been silenced by methods peculiar to the past, the nation is becoming so much alive to the situation, so thoroughly convinced of the fact that a concern which has grown to such proportions that it is able to control the American market is not an "infant" which is entitled to protection, that the line is being clearly drawn between protection and monopoly. Issues of war, of constitutional reform, of currency, and other issues ingeniously presented by the managers may serve for a time to delay final judgment. But the day is not far distant when no political leader who expects a following will advocate tariff protection to industries which have assumed such proportions. Taxation for such purpose is not only in itself contrary to the underlying principles of democracy, it not being laid on the basis of ability to pay, but it also carries with it a form of tribute which can be supported only by the most arbitrary and absolute forms of government. The National necessity for revenue being such that a sufficient amount can be realized from other sources, customs duties have no just foundation except in so far as they may serve the general welfare by protecting "infant industries." As to tariffs for the protection of the products of monopolies and well-developed industries, both the economic interests of the

people and the announced principles of political parties demand that they be repealed, and that the revenues be raised either from luxuries or by direct taxation.

In the States direct taxation is the form most generally employed. In the early colonial period this was not the case. At this time there were few public burdens in the form of taxes of any kind. The proprietary and colonial corporation derived their revenues from quit-rents, fines, fees, franchises, etc. It was only after the proprietary and the stock company had lost their monopoly in government that, to any considerable extent, assessments were made. In the voluntary associations, however, direct taxes, laid on the basis of assessed valuation, are found almost from the beginning. The democratic theory of taxation according to ability obtained in Massachusetts at an early date. The laws of 1640, p. 56, recite:

That the lands and estates of all men (wherein they dwell) shall be rated for all town charges. \* \* \* For a more equal and ready way of raising means for defraying the public charges and for preventing such inconveniences as have fallen upon former assessments, it is ordered \* \* \* that the Treasurer (colonial) for the time being shall \* \* \* send his warrants to the constables and selectmen of every Towne within this Jurisdiction, requiring the Constable to call together the Inhabitants of the Towne, who, being so assembled shall choose some one of their freemen \* \* \* who, together with the Selectmen, for their prudential affairs shall \* \* \* make a list of all the male persons in the same Towne from sixteen years old and upwards, and a true estimate of all personal and real estates \* \* \* according to just valuation.

This method of assessment was continued in the Massachusetts colony, the tax being apportioned to the towns and the town selectmen and the constable fixing the rate according to the lists returned by the assessor.<sup>71</sup> Maine,

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<sup>71</sup> The act of Feb. 20, 1786, directed the assessor to "assess the polls of and estates within such town or district, their due

establishing a system of assessment and taxation, followed almost the exact language of the Massachusetts statutes.

Connecticut, at an early date, employed the same plan, each statutory revision being a restatement with such modifications as appealed to the legislative body as being better adapted to the ends of equality and justice. The law of 1796, taken largely from the early laws, provided:

All rates and taxes shall be granted by the General Court, and all other rates or taxes of counties, towns, societies or any community by law enabled to grant and levy taxes, shall be made by the same rule, that is to say, according and in proportion to the general list of polls and ratable estates from time to time given, and made according to law, except where another rule of granting and levying rates, taxes and assessments is by law provided in any particular case or cases.

In Rhode Island the principle of taxation by assessed valuation was well established by 1696, and was continued in the many revisions of the colonial period.<sup>72</sup> As stated in the law of 1798:<sup>73</sup>

When any tax is ordered to be assessed and levied on the inhabitants of this State, or any estates within the same, the Secretary of the State for the time being, shall forthwith send a copy thereof unto each of the Town Clerks in the State, to be by them immediately delivered to the Assessors of the respective towns; and that the Assessors of each town shall assess and apportion the same upon the inhabitants of such town or the ratable estates of the same. \* \* \* And the Assessors of each town \* \* \* shall \* \* \* set up three notifications under their hands, requiring the inhabitants of

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proportion of any tax," and provides to this end that the assessor "shall lodge in the said clerk's office the invoice and valuation, or a copy thereof, from whence the rates or assessments are made that the inhabitants or others rated may inspect the same."

<sup>72</sup> See Laws of 1696, 1702, 1744, 1747, 1755, 1757, 1758, 1761, 1763, 1764, 1781, 1782, 1785, 1798.

<sup>73</sup> Laws 1798, p. 407.

their towns to bring in to them in writing \* \* \* an exact list of their ratable estate under oath. \* \* \* That the Assessors shall, before they apportion the tax among the inhabitants, make a list containing the value of all such persons' estates according to the best judgment of the Assessors, on the inhabitants of such who neglect or refuse to give in an account thereof agreeable to law, and of the number of ratable polls, and deduct the sum that the polls will raise from the sum to be assessed and levied; and the Assessors shall cast the ratable estates, and thereby find out how much percenture it will be, and will apportion the tax accordingly. \* \* \* That all town taxes shall be assessed, levied and collected in the same manner as the State are, or by this act ought to be.

In 1796 Secretary of the Treasury Wolcott made an exhaustive report on the tax systems then in vogue in the several States.<sup>74</sup> From this it appears that in three of the States<sup>75</sup> taxes were laid ad valorem on the collective mass of property not exempt by law, at a uniform rate; and in one<sup>76</sup> taxes were assessed on the basis of the income derived from all sources. In the other States the properties subject to taxation were specifically named. In all of the States except two<sup>77</sup> land was taxed on some basis of valuation.<sup>78</sup> Horses and cattle were taxed in thirteen of the States. Many other objects are specifical-

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<sup>74</sup> State Papers (Finance), Vol. I, p. 414, "Direct Taxes."

<sup>75</sup> Rhode Island, New York and Maryland.

<sup>76</sup> Delaware.

<sup>77</sup> South Carolina and Georgia. These States were largely controlled by an aristocracy, and it was of advantage to them to have all lands taxed equally.

<sup>78</sup> The taxes on land were laid on the basis of assessed valuation in Virginia, Maryland, Pennsylvania, New Jersey, New York and Rhode Island; in New Hampshire the value was determined for the purposes of taxation on the basis of rent; in Delaware on the basis of income; in Vermont, Kentucky and North Carolina the lands were classified on a basis of quality, and each class had a different rate; in Connecticut the valuation was estimated according to the use, as ploughland, meadowland, etc.

ly named with considerable variation. There are some of these differences that may be attributable to institutional difference, for example: Slaves were taxed in all of the Southern, and in all but one<sup>79</sup> of the Middle, States.<sup>80</sup> Poll taxes are confined to the New England States,<sup>81</sup> with two exceptions.<sup>82</sup> Processes of law were taxed in the Southern States.<sup>83</sup> A tax on billiard tables was imposed in four of the Southern States.<sup>84</sup> Taxes on money were imposed in all of the New England States, but in none others. There are two other facts that seem to have arisen out of institutional differences, viz.: In all of those States which grew out of voluntary associations the State taxes were apportioned to and assessed against the towns or other local administrative bodies as a unit; while in most of the other States—those having a proprietary or central corporate origin—the State government levied the taxes directly against the persons or property within its jurisdiction. In those States where the taxes were laid against the towns or local bodies the assessors and collectors were elected by and made responsible to the people, while in those having central administration, they were appointed by the county court, or commissions, the State Treasurer, the legislature or

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<sup>79</sup> New York.

<sup>80</sup> In Delaware they were taxed only through the income.

<sup>81</sup> This may be accounted for on the theory prevailing that all, not paupers, should contribute something to the support of government; it may be accounted for on the ground that there was not such great disparity of classes in New England. When, however, there is inequality in wealth, poll taxes, if high, are very iniquitous.

<sup>82</sup> North Carolina and Georgia. In these States we have every reason to believe that poll taxes were laid in order that the large land holders might relieve themselves as far as possible.

<sup>83</sup> This was probably a remnant of the proprietary and company rule.

<sup>84</sup> This is one of the evidences of a wealthy, aristocratic, leisure class.

the Governor. Those States which were most nearly in touch with the people were the first to adopt the principles of equality in taxation. Those which were founded on European models were the last to come to this basis. Some of the Southern States did not adopt the taxation of all property not specifically exempt by law till after the civil war. By the middle of the century, however, taxes laid on all property proportional to value, at a uniform rate, became the rule.

But with the multiplication of the forms of property the rule became difficult of administration. Many forms of personal property, such as franchises and corporate interests, could not well be valued, and other forms, such as securities, credit instruments, etc., were easily secreted. This has led to great confusion in the application of principles of justice and equality. As a consequence, attempts have been made, by special forms of taxation, to reach the end desired.

One feature of the law, made possible by direct taxation, however, is deserving of mention—that of the exemption of certain property from public burdens, in the interest of the general welfare. Among the first to be favored by exemption were properties used for religious and educational purposes. As democracy gained in political power, as the protection of the weak against the strong, came to be recognized as one of the highest duties of the State, it became the settled policy of our government to so modify the established order that all might have the means for self-support and a sufficient competence to provide for the comfort and education of the family. This was deemed to be one of the first conditions of good citizenship, the necessary foundation of free government. Provisions for exemption of implements of trade and occupation are found in many of the old colonial laws. At the time of the formation of the National government the New England States generally ex-

empted implements, work horses, etc., from distraint in the collection of taxes. In Rhode Island household furniture, excepting plate, farming utensils, the tools of mechanics, and one-quarter part of property at sea, were exempt. In Vermont exemptions were made to persons disabled by sickness or infirmity. Lands planted or tilled for planting orchard trees were also exempt for ten years. In New Hampshire it was not lawful to take by distress the tools or implements necessary to trade or occupation, firearms or the necessary household furniture of the family. In Massachusetts it was unlawful to distraint the tools or implements of a trade or occupation, beasts of the plow necessary for the cultivation of improved lands, arms, or the household utensils or apparel necessary for the family. Quite similar provisions are found in many of the other States. As the variety of property has increased and the standards of life have become higher, the exemptions have also in many States increased. The exemptions from taxation as they appear are shown on the chart set forth in appendix IV, p. 526. Not only do these exemptions contribute to the general welfare by encouraging, saving and raising the standard of citizenship, but they also accord with the principle of payment according to ability, in that they tend to put the burden on surplus, over and above a competence for livelihood.

3. INDEBTEDNESS.—The constitutions of most of the States provide that no town, county or municipality shall give money or property to any corporation having for its object a dividend of profit.<sup>85</sup> Nor can it

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<sup>85</sup> Ala., 1875, IV, 55; Ark., 1874, XII, 5; Cal., 1873, IV, 31; Colo., 1876, XI, 2; Conn., 1818, Am. 25; Fla., 1868, XII, 7; Ga., 1877, VII, 6; Ill., 1870; Ind., 1851, X, 6; La., 1879, 56; Mo., 1875, IV, 47, XI, 6; Neb., 1875, XIV, 2; N. H., 1792, II, 5; N. J., 1844, I, Am. 19, 20; N. Y., 1846, VIII, 11; Ohio, 1851, VIII, 6; Ore., 1857, XI, 9; Penn., 1873, IX, 7; Tex., 1876, III, 52, XI, 3; Wis., 1848, XI, 3.



loan its money or credit to such corporations,<sup>86</sup> nor become security for them,<sup>87</sup> nor become a stockholder.<sup>88</sup> In some the legislature cannot authorize them to do so.<sup>89</sup> Specific limitations are placed on the power of the State to contract loans to meet deficits.<sup>90</sup>

As to other debts, many of the constitutions restrict the power to specific purposes.<sup>91</sup> In several of the States it is provided that no debt shall be contracted by the legislature unless authorized by a law which at the same time makes provision by taxation for its payment,<sup>92</sup> thus at once fixing the responsibility. Many require propositions for incurring indebtedness to be referred to the people.<sup>93</sup> With all of these safeguards against involving the State in debt, our States and nation hold a unique position in that, in spite of misappropriations and mismanagement they have been kept remarkably free from excessive burdens of debt, and have been most honorable in dealings with creditors. The people have not repudiated the debts incurred by public agents except in a very few instances where it has appeared to them that these agents have been most flagrant in their betrayal of public trust, where those who have received these obligations have had, or with

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<sup>86</sup> Id.; also Ark., 1874, XVI, 1; Colo., 1876, XI, 1; Md., 1867, III, 54; Nev., 1864, VIII, 10; Tenn., 1870, II, 29.

<sup>87</sup> Cal., 1873, IV, 31; Colo., 1876, XI, 2; N. J., 1844, Am. 19, 20; N. H., 1792, II, 5.

<sup>88</sup> Id.; also Neb., 1875, XII, 1; Colo., 1876, XI, 2.

<sup>89</sup> Cal., 1873, IV, 31; Ala., 1875, IV, 55; Ga., 1877, VII, 6; Fla., 1868, XII, 7; Mo., 1875, IV, 47; N. H., 1792, II, 5; Ohio, 1851, VIII, 6; Tex., 1876, III, 52.

<sup>90</sup> See Mich., 1850, XIV, 3; Wis., 1848, VIII, 6; Tex., 1876, III, 49; Mo., 1875, IV, 44; Cal., 1873, XVI, 1; Ky., 1850, II, 35; Ohio, VIII, 1; Kans., 1859, XI, 5.

<sup>91</sup> See Cal., 1873, XI, 3; Ga., 1877, VII, 12; Iowa, 1857, VII, 4; Kans., 1859, XI, 7; Me., IX, 15; Neb., 1878, XIV, 1; Ohio, 1851, VIII, 2.

<sup>92</sup> See Kans., 1859, XI, 5-6; Minn., 1857, IX, 5; Md., 1867, III, 34; Mo., 1864, IX, 3; Ky., 1850, II, 36; Ill., 1870, IV, 18.

<sup>93</sup> See Chapter X.

the exercise of due diligence might have had, notice of the fraud, and in many instances have been participites criminis. In these very few cases repudiation of illegal and unauthorized acts was the only means of protection from spoliation.<sup>94</sup>

4. CORPORATIONS:—This form of industrial organization has recently commanded attention by reason of the facility offered for centralizing power in the hands of a few which might be, and in many cases has been, used to the end of perverting the functions of government in the interests of its managers. Some of the most corrupt measures and rankest frauds have been perpetrated by these forceful combinations. A slight advantage gained over competitors by means of legislative grants and official acts is of such enormous economic importance to those procuring them as to make it an object at times to pay millions of dollars for these privileges. This has proven an inducement to corruption and a means of spoils such as could not be withstood while the power of making these grants or giving these advantages remained in the hands of the legislature. To cope with

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<sup>94</sup> Four States have repudiated debts incurred by public agents in aid of private enterprises. Two of these (Florida and Missouri) had become thus involved during the speculative period prior to the panic of 1837; the funds had been used for private speculation and the interests of the people completely ignored. The other two (Minnesota and Michigan) had been involved in enterprises in which the despoilers had become enriched and the projects left in a bankrupt condition for the State to settle. In all of these there was at least a questionable use of power. The other States which have repudiated their debts were those which had been subjected to the tyranny of carpet-bag rule after the civil war. They had not only been held under the firm grasp of the national military organization during the period of reconstruction, but, while thus bound hand and foot, they had been ruthlessly plundered. It was on account of this subversion of the government, which had been taken out of the hands of the people and exercised by a band of unconscionable spoilsmen, that the people of these States, on recovering control, repudiated the acts of those who had been imposed upon them as governors, but whom they did not recognize as their political agents.

this evil, constitutions have placed many restrictions on legislative power. Some have forbidden the granting of charters by special act;<sup>95</sup> others have made monopolies combinations and trusts unlawful.

Owing to fraudulent and surreptitious acts on the part of capitalistic combinations, provisions have been adopted making such organizations the subject of public control to a much larger extent than other private concerns. In the first place, the time of charter grants has been very much reduced, the amount of capital stock limited, the liability of stockholders enlarged, limitations placed on their power to hold real estate; greater publicity has been given to these corporate affairs; special limitations have been made relative to banks and other financial institutions. Railways, canals and other corporate common carriers have been made the subject of special control.

One of the fictions most favorable to corporations is that established in the Dartmouth College case, by virtue of which it became an established principle of our law that the charter of a private corporation was in the nature of a contract, and could not be impaired by the States. It then became of the utmost importance for the corporation to get from the agent of government a contract most favorable to themselves.<sup>96</sup> To overcome the

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<sup>95</sup> Ala., 1875, XIV, 1; Ark., 1874, XII, 2; Cal., 1873, XII, 1; Colo., 1876, XV, 2; Ill., 1870, XI, 1; Ind., 1851, XI, 13; Ia., 1857, VIII, 1; Kan., 1859, XII, 1; La., 1879, 247; Me., 1820, IV, 3; Md., 1867, III, 48; Md., 1850, XV, 1; Minn., 1857, X, 2; Mo., 1875, XII, 2; Neb., 1875, XIII, 1; Nev., 1864, VIII, 1; N. J., 1844, IV, 7; N. Y., 1846, VIII, 1; N. C., 1868, VIII, 1; Ohio, 1850, XIII, 1; Ore., 1857, XI, 2; Tenn., 1870, XI, 8; Tex., 1876, XII, 1; W. Va., 1872, XI, 1; Wis., 1848, XI, 1.

<sup>96</sup> This is one of the principal reasons why it is unsafe to leave the granting of charters to special acts. When each voluntary association must apply to the legislature separately there is every inducement for them to use all methods necessary to procure the powers and privileges desired for their special use. When they are given no opportunity to incorporate except under a general act applying to all corporations of the kind then the

injury which such action would do to the public and at the same time not to violate the fundamental law of the land, our people have adopted such provisions as this: "All general laws and special acts \* \* \* may be altered from time to time." But while the law might be repealed, charter privileges might still be claimed under the former law, therefore another step follows, as for example: "Corporations may be formed under general laws, which laws may from time to time be altered or repealed." "The general assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this State, in such manner, however, that no injuries shall be done to the incorporators." Still this was found to be too unfavorable to the public, as any withdrawal of powers or limitations must be compensated for, therefore a third step: "The general assembly shall by general laws provide for the revocation or forfeiture of the charters of all corporations guilty of abuse or misuse of their corporate powers, privileges and franchises, or whenever said corporations become detrimental to the interest and welfare of the commonwealth or its citizens."

This may be considered the most advanced step in the direction of control of corporations and of protecting the people against the bribery of legislatures and the procurement of franchises unfavorable to the interests of the public. Every subsequent legislature may revoke the charters granted by former ones, and therefore constitute a complete check. This provision does not violate the principles of contract, as the law is a part of

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inducement is reduced to a minimum. The history of banking furnishes a good example of this. Under the regime of special charters the banks were constantly employing corrupt means of procuring their charters. Under the "general law" this is avoided.

every contract and when the constitutions have made a provision of this kind it becomes a part of the contract by which the grant is made.

#### 5. SPECIAL, LOCAL AND PRIVATE LAWS:—

One of the most fruitful instruments of public plunder employed immediately after the formation of our government was that of special, local and private legislation. In the first place it is adverse to the theory of the separation of powers on which our governmental system is based. It places in the hands of the legislature a power relative to special matters that should be left to executive and administrative discretion, exercised under general law. Legislation must of necessity, when confined within its proper sphere, make general rules for the government of society; otherwise it must be inequitable and involve the members of society in uncertainty and interminable conflict. In the second place special legislation, being administrative in its nature, i. e., it being an exercise of discretion relative to particular cases, puts into the hands of the legislature the power both of making the law and applying it to the special case. The breaking down of the check established by the separation of powers requiring that administrative discretion be exercised under rules of law, opens up one of the broadest avenues to corruption and misuse known to government.

But special legislation in some cases is found most wholesome, as in making up the annual budget and passing it, supplying special rules of action when no general rules can be applied, giving special relief, securing defective tax titles, etc., and therefore, in order to give the government the benefit of special legislation in such matters as might seem to be wholesome, a plan has been gradually evolved whereby constitutional prohibitions of its use have been made special. That is, instead of prohibiting all special legislation, it has been prohib-

ited in the exercise of such legislative powers as seem to the best interest of the State. The specific constitutional limitations on special legislation adopted in the various States are about seventy, and include nearly all of the subjects in which the power of special legislation is the subject of abuse. The special prohibitions may be classified as follows:

As to corporations:—(1) The granting to any person or corporation of any exclusive privilege, immunity or franchise (except municipal franchises in some States), (2) granting to any person or corporation the right to lay down railroad tracks, (3) providing for the chartering of bridge companies, except as regards certain bridges across streams at boundaries of States, (4) chartering or licensing ferries, (5) chartering or licensing turnpike companies, (6) incorporating railroads, (7) incorporating other works of internal improvement, (8) creating incorporations, (9) amending, renewing, extending or explaining the charters of corporations, (10) authorizing the construction of street railways, (11) creating banks.

As to private rights and remedies:—(1) Giving effect to informal and invalid wills, (2) changing the law of descent, (3) legitimating children not born of lawful wedlock, (4) adopting any person, or constituting any person the heir of another, (5) changing the name of any person, (6) declaring any person of age, (7) granting divorces, (8) authorizing or providing for sale and conveyance of real estate, (9) providing for conveyance of property of persons under disability, (10) effecting the estates of minors, (11) providing for the sale of church property or property held for charitable purposes, (12) authorizing deeds to be made for land sold for taxes, (13) prescribing the effect of judicial sales of real estate, (14) relating to interest on money, (15) authorizing the creation, extension or impairing of liens, (16) providing

for the method of collecting debts or enforcing judgments, (17) releasing persons for debt due to inhabitants or corporations.

As to the exercise of the police power:—(1) Relating to cemeteries, grave-yards, or public grounds not belonging to the State, (2) regulating trade, (3) regulating manufacture, (4) regulating labor, (5) protecting fish and game, (6) regulating agriculture.

As to public improvements:—(1) Laying out and opening of highways, (2) vacating roads, streets, plats and public squares, (3) providing for building bridges, (4) locating and changing the location of county seats.

As to political organizations and the exercise of official power:—(1) Erecting new townships or counties, (2) changing county lines, (3) incorporating cities and towns, (4) amending the charters thereof, (5) regulating the affairs of county and township officers, (6) regulating the affairs of municipalities, (7) providing for the management of common schools, (8) creating offices and prescribing the duties of municipal officers, (9) relating to the salaries and fees of officers, (10) authorizing extra compensation for officer, agent or contractor after service rendered, (11) creating or altering fees or salaries during term of officers, (12) regulating the jurisdiction, fees, powers or duties of aldermen, justices of the peace, constables, etc., (13) legalizing the unauthorized acts of officers, (14) restoring to citizenship persons disqualified for conviction of crime, (15) relieving the assessor or collector of taxes from performance of duty and his sureties from liability.

As to judicature:—(1) Selecting or impaneling a jury, (2) laws for punishing crimes or misdemeanors, (3) pardoning or commuting sentence, (4) remitting fines, forfeitures or penalties, (5) regulating the practice of courts, (6) establishing their jurisdiction, (7) providing for

change of venue, (8) changing the rules of evidence, (9) prescribing limitations to actions.

As to finance:—(1) Providing for the bonding of cities and towns, (2) providing for the assessment or collection of taxes, (3) exempting persons or property from taxation, (4) providing for the support of common schools, (5) providing for the apportionment of the school fund, (6) extending the time for the collection of taxes, (7) refunding money paid to the State, (8) releasing persons for debts due to the State or any municipality.

As to elections:—(1) Regulating general elections, (2) regulating elections of county or township officers, (3) providing for election of board of supervisors, (4) opening and conducting elections or designating places of voting.

In no State do all of these prohibitions against special legislation specifically appear, but it is a significant fact, indicative of the progress of our institutions, that, whereas the first constitutions contained few or no limitations of this kind, the later ones have constantly enlarged their enumerations till a few contain as many as forty distinct prohibitions against special legislation. Some, indeed, have gone further than it is possible to do by specific enumeration alone, adopting a general provision, as in Kansas: "All laws of a general nature shall have a uniform operation throughout the State, and in all cases where a general law can be made applicable, no special law shall be enacted," or as in Montana, after especially enumerating thirty-six prohibitions, adding, "In all other cases where a general law can be made applicable, no special law shall be enacted," and when such provision has been made it has been held that the courts may adjudicate the question as to whether the subject is one "where a general law can be made applicable," even though the legislature has decided that it is not.



## CHAPTER XIV.

## MODIFICATIONS OF LAW AS A RESULT OF POPULAR CO-OPERATION (3) RELATIVE TO CERTAIN SUBJECTS OF PRIVATE LAW.

We have traced the evolution of Public Law as a result of popular co-operation in government. We will now turn our attention to the modifications of Private Law to the same end. It being impossible at this time to go over the whole field we will confine investigation to those subjects which seem most closely related to the growth of democracy, viz.: Capital and Labor, and Debtor and Creditor.

## I.

## CAPITAL AND LABOR.

Law being conceived of as the habitual or established order of things, the recognized mode or method of action, or, in the last analysis, as an habitual method of thought, it follows that a statute is merely an authoritative expression or formulation of that common method. A law therefore cannot be the spontaneous generation of a moment; it must be the result of a long continued evolution. The minds of the various members of the political State in which the law is established must be similarly affected; the method must become common before the establishment is possible. Environment, reflecting itself upon the minds of the individuals of society, is again reflected back in a common expression; this is called legislation. A comprehensive view of the evolution of laws in the United States relative to capital

and labor, therefore, suggests the propriety of a few observations concerning the environment of the early colonists, the laws and institutions of the land in which they had lived.

We find that the English social environment had been one in which the laborer was looked upon as the very lowest stratum of society. The famous statute of 22 Edward III., 1349—which declared that every person who was under the age of sixty years, and who did not have the means to live, should, on being required, “be bound to serve him that doth require him,” which fixed the scale of wages and declared that no higher wages should be paid under penalty—the Elizabethan statutes (5 Eliz., ch. 4, et seq.)—which provided that all persons able to work, not having independent means, could be compelled to go into agricultural employment, and which provided further that the justices of each locality should, from time to time, call in “such discreet and grave men as they shall think meet,” and after conferring together concerning the “plenty and scarcity of the time” should fix the wages of the various classes of laborers, a violation of which would entail severe punishment—these provisions were only the reflection of a common method of thought, common principles, which were embodied in the legislation of England down to 1813, and which, in fact, were not wholly erased from their legal system until 1875,—38 and 39 Victoria, ch. 86.<sup>1</sup> If a laborer left his employment he might be imprisoned, while the master, wrongfully dismissing his servant, was liable to a fine only. In case of breach of contract the remedy against the master was civil, while that against the servant was criminal.

Chafing under these unjust restrictions on their freedom of action, English laborers early showed signs of

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<sup>1</sup> For tabular statements of wages fixed by law and the justices see Appendix IV.

discontent.<sup>2</sup> Their discontent found expression in organizations, petitions, and at times in revolution. But so thoroughly was the idea of the inferiority of the laborer implanted in English thought that even during that period of religious and political agitation known as the Reformation he was scarcely regarded as having rights or liberties in common with other classes of society. Any agitation on the part of the laborer was regarded by society as directed against the peace and general welfare. Organization, even for mutual aid and protection, was made unlawful; combinations for the purpose of raising wages were held to be conspiracy; severe penalties were inflicted and large rewards offered for discovery.<sup>3</sup> Jus-

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<sup>2</sup> Wells, in his *History of Trade Unionism*, p. 3, quoting from Clode's *History of the Merchant Tailor's Company*, Vol. I, p. 63: "In 1845 the tailors' 'serving-men and journey-men' in London have to be forbidden to dwell apart from their masters, as they hold assemblies and have formed a kind of association," and from *Letters and Papers, Foreign and Domestic, Henry VIII*, Vol. XIII, Part I, 1538, No. 1454, p. 537, "In 1538 the Bishop of Ely reports to Cromwell that twenty-one journey-men shoemakers of Weisbach had assembled on a hill without the town, and sent three of their number to summon all master shoemakers to meet them, in order to insist upon an advance of their wages, threatening that "there shall none come into the town to serve for that wages within a twelve-month and a day."

<sup>3</sup> 1548—2 and 3 Edward VI, Ch. 15: "And likewise artificers and the craftsmen and laborers have made conspiracies and promises and have sworn mutual oaths, not only that they should not meddle with one another's work and perform and finish that another hath begun, but also to constitute and appoint how much work they shall do in a day, and what hours and times they shall work, contrary to the laws and statutes of the realm, and to the great hurt and impoverishment of the King's Majesty's subjects, for reformation whereof it is ordained and enacted by the King our sovereign lord, \* \* \* if any artificers, workmen or laborers do conspire, covenant or promise together, or make any oaths that they shall not make or do any works but at a certain price or rate, or shall not enterprise or take upon them to finish that another hath begun, or shall do but a certain work in a day, or shall not work but at certain hours and times, that then every person so conspiring, covenanting, swearing or offending, being lawfully convicted thereof, \* \* \* shall forfeit for the first offense *ten pounds* to the King's Highness; and if he have sufficient

tin McCarthy, in his *History of Our Own Times*, speaking of the legal status of the laborer, says:

Down to 1825 a mere combination of workmen for their own protection was unlawful, but long after 1825 the law continued to deal very harshly with what was called conspiracy among workmen for trade purposes. The very laws which did this were a survival of the legislation which for centuries had compelled a man to work for whosoever chose to call him, and either fixed his maximum of wages or left it to be fixed by the justices.<sup>4</sup>  
\* \* \* If he thought his wages ought to be raised or ought not to be lowered a court of law could not assist him. Once it would have compelled him to take what was offered and work for it or go to prison. Now, in better times, it would offer him no protection against the most arbitrary conduct on the part of an employer. He was admonished that he must not combine to fix the price of labor, \* \* \* yet he knew very well that in many trades the masters did, by association among themselves, fix the price of labor. He knew that there were associations of employers which held meetings at regular periods for the purpose of agreeing as to the wages they would pay to workmen. He failed to see why he

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to pay the same, and do also pay the same within six days after conviction; or else shall suffer for the same offense twenty days' imprisonment and shall only have bread and water for his sustenance; and for the second offense shall forfeit twenty pounds to the King \* \* \* or else suffer for the second offense punishment of the pillory; and for the third offense shall forfeit forty pounds to the King \* \* \* or else shall sit on the pillory and loose one of his ears, and shall at all times thereafter be as a man infamous, and his saying, depositions or oath not to be credited at any time in any matter of judgment."

Other statutes of similar import: 7 George I, Ch. 13, 1721; 36 George III, Ch. 3, 1796; 39 George III, Ch. 81, 1799; 40 George III, Ch. 106, 1800.

39 George III, Ch. 81, made all contracts of this kind unlawful; all persons connected therewith subject to confinement in jail, not exceeding two months; all persons entering into a combination to prevent others from hiring or to induce them to quit, confinement for two months; all persons attending meetings or who shall contribute to the expenses incurred for acting contrary to the statute, three months' confinement.

<sup>4</sup> *History of Our Own Times*, II, p. 395.

and his fellows should not come to a common resolution as to the wages they would accept.<sup>5</sup>

The revolting tyrannies which this system encouraged and allowed cannot be better illustrated than by the historical record of practices in certain mines where, upon investigation, it was found that many whole families were kept constantly underground to save housing, and in coal mines where seams were narrow, in order to save excavation, low trams were drawn by women half-clad or naked a long ways so low that they were compelled to work in a harness upon their hands and knees.

The effect of such legislation and a social system which held service and labor as a badge of ignominy, the laborer as not entitled to the ordinary humanities which divided society into orders and castes, and of these held the producers of wealth the lowest, is to be seen in our colonial legislation. Restrictions and prohibitions of every imaginable kind were indulged in. In Virginia a man-servant marrying without the consent of his master must serve one year, a maid-servant double her time, and a freeman not only double his time, but pay a fine of five hundred pounds of tobacco.<sup>6</sup> Runaways were bound to serve twice the time absent for first offense and be branded with the letter "R" for the second.<sup>7</sup> Dealings with servants "for any commodity whatsoever without the consent of the master" were punishable by fine and imprisonment.—Laws 1657. Corporal punishments were allowed to be administered with the injunction, however, that the master "neither shall at any time whip a Christian white servant naked without an order from the justice of the peace."<sup>8</sup> We are left to conjecture to what extent it might be indulged when the servant did not happen to be a white Christian or naked. Resist-

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<sup>5</sup> Id., p. 400.

<sup>6</sup> Laws 1642 and 1657.

<sup>7</sup> Laws 1642.

<sup>8</sup> Laws 1705.

ing a master was punishable by an added service of two years.<sup>9</sup>

In Massachusetts the law provided that a servant maimed or mutilated by a master, except by accident, should go free. In 1661 a law was enacted in Virginia which reads in part as follows: "Whereas the private burial of servants and others give occasion for much scandal against divers persons \* \* \* of being guilty of theur death \* \* \* by reason they are for the most part buried without the knowledge or view of any others than such of the family as by nearnesse or relation (as being husband, wife or children are unwilling) or as servants are fearful, to make discovery if murder were committed, for remedy whereof, as alsoe for taking away the barbarous custom of exposing the corps of the dead (by making their graves in common and unfenced places) to the prey of hoggs and other vermine, be it enacted," etc., providing for burial in certain places and in public, and again in 1662, "whereas, if a woman got with child by her master should be freed from service it might induce all loose persons to lay all of their bastards to their masters, be it enacted that each woman got with child by her master shall be sold for two years and the tobacco (money) be imployed by the vestry." In Massachusetts (1662) servants were restricted and prescribed as to their apparel and, in 1698, prohibited the privileges of a public house. This short digest is given to show something of the legal and social status of labor at the beginning of our history.

The restrictions on wages may be shown by references to the laws of the various colonies. The Laws of Massachusetts (1630, 33, 35, 36, 41) provided that wages should be fixed by the town and that all laborers and servants should be bound thereby. The Plymouth colony (1638)

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<sup>9</sup> Laws 1761.

enacted that "a laborer shall have twelve pence a day and his dyett, or eighteen pence a day without dyett, and not above, throughout the govern't." The Massachusetts Bay colony (1633) provided that carpenters, sawyers, masons, bricklayers, tilers, joiners, wheelwrights, mowers and other laborers should have two shillings without board, or fourteen pence with board, and that the constable, together with two others, were to fix the price of inferior laborers. We will not detail the restrictions imposed by Virginia and the other colonies. Suffice to say that three important steps in the evolution of our laws effecting the social and legal status of the laborer may be attributed to the colonial period. In the first place, villenage and serfdom had never been established. The laborer and servant was not bound to the soil or affixed to the estate of his master. Even after slavery was introduced the slave was not an appurtenance to real property; he was regarded rather as a member of the familia, using the Roman concept. In the second place, the restrictions on freedom of contract were gradually removed. In the third place, the remedy of the master for breach of contract was restricted to civil judgment.<sup>10</sup>

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<sup>10</sup> Three States have subsequently extended criminal remedy to breach of contract. Louisiana, Laws 1890, Ch. 138, Sec. 1; Arkansas, Statutes, Sec. 4790; Tennessee, Statutes, Sec. 3438. But these measures have clearly arisen out of the degrading influence of slavery. Something approaching the re-establishment of the ancient practice, and, perhaps, upon still more questionable ground, may be found in the recent employment of writs of injunction sustained by Judge Ross in *Southern California Ry. vs. Rutherford*, 62 Fed. R., 796.

Another advance may be attributed to the Colonial period in the removal of restrictions upon freedom of association and combinations for the mutual advantage of those combining, although freedom of association was not fully established until about eighty years afterwards; some of the courts, relying upon English precedents, based on the English laws making associations of labor illegal—had held labor combines to secure higher wages and plan strikes, illegal and conspiracy. Stimson, in his *Hand Book of Labor Laws*, p. 202, speaking of the

The very fact that the first colonists attempted to manage their concerns on a co-operative basis is indicative of their high regard for the common industrial welfare. Although they had brought with them feudal ideals and feudal institutions, they were compelled by economic conditions to throw off the artificial environment of class and caste. Common perils and common interests furnished a common bond of sympathy, placed them upon a higher moral plane and cultivated a more lofty regard for human rights. This new environment gradually modified their institutions and before the war of the revolution the laws restricting freedom of contract and freedom of association had vanished.

The evolution up to this point may be regarded as negative—consisting of a removal of restraints. Fundamentally, however, it was positive; it established equity between employer and employee, master and servant, and placed the capitalist, the undertaker<sup>11</sup> and the laborer upon the same level. Had not society become more highly differentiated in its industrial structure, had the relation of master and servant retained its ancient simplicity, had agricultural pursuits remained the chief occupation and manufacture continued to be carried on by

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Journey-man Tailors' case, says: "It was followed in three early cases, happening respectively in Philadelphia in 1806, in New York in 1809, and in Pittsburg in 1815. All decided, however, in inferior courts." The principle was finally settled in *Commonwealth v. Hunt*, 4 Met. (Mass.), 111, in 1842, and in *Master Stevedores v. Walsh*, 2 Daly (N. Y.), 1, in 1867, when these courts held that a combination of laborers to raise wages was not legal and that laborers had a right to leave their work or combine at any time for a lawful purpose, such as to raise their wages. This doctrine, established in the cases named, was regarded as the settled law in the United States till the interstate commerce law was enacted in 1887, when this, together with the Anti-Trust laws of 1890 and the practice growing out of the appointment of receivers for corporations, modified the doctrine to some extent.

<sup>11</sup> The capitalist and the undertaker had not been clearly distinguished in their industrial functions at this time.



small industrial groups, it is highly probable that society would have recognized no necessity for positive legislation for the protection of labor. But the web and woof of the industrial fabric gradually changed; in place of the small industrial group was introduced the factory; in place of hand labor, massive machinery. The capitalist, the laborer, the undertaker each assumed separate and distinct functions. Labor and capital were separated; the entrepreneur stood between and in command of both. In the hands of the undertaker materials, capital and labor were only elements to be combined in the most effective manner, i. e., to the greatest profit of the undertaker, and the corporation was found a most useful institution for bringing all of these elements into the most economic relations. Now we have a completely changed environment developed by society in its industrial activities, the reflection of which in our laws, during the National period, it is our present purpose to trace.

The right of freedom of contract, so far as developed during the colonial period, was a common-law right, extending to contracts which were neither immoral nor criminal nor prohibited by statute. As the statutory restrictions were gradually removed, the common law principle was extended in its operation, subject, however, to statutory enactment.<sup>12</sup>

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<sup>12</sup> Many of our courts have held this, the right of freedom of contract, to be inalienable. They have regarded it as a part of the English constitution and therefore, being constitutional, unless either expressly withheld by the constitutions or expressly placed in the hands of the legislature, not the subject of ordinary legislation. The authorities holding this view have been collected by Mr. Stimson on page 4, *Hand Book of Labor Laws*. Other courts and authorities hold that the State legislatures are only limited by the constitutions of the State and the United States. (*Id.*, pp. 4 and 5.) This latter position seems the more tenable from the fact that in the colonies, prior to our adoption of our national and State constitutions, and in England the right to freedom of contract had been frequently abridged by legislation. Even when regarded as constitutional it must be held a part of the unwritten constitution, and this always gives way to the written formulations.

After the adoption of our constitutions the courts construed "the right to acquire, possess and protect property" guaranteed by many of the State constitutions, and the provision "that no person shall be deprived of life, liberty or property except by due process of law" to imply the right to make reasonable contracts and that this right could not be taken away by the legislatures.<sup>13</sup> These constitutional provisions being so construed, we will regard them as the first step by way of positive legislation in establishing the relations between capital and labor after the attainment of our independence.

Immediately following this, the National government initiated a series of tariff enactments which, though not at all times designed for this purpose, have served to protect the laborer as well as the manufacturer against unfavorable foreign competition.

The third step in advance immediately followed, introductory to our laws securing payment for wages, viz., a statute providing for mechanics' liens. As to the history of this class of legislation, we quote from Phillips on Mechanics' Liens.<sup>14</sup>

The lien of mechanics on buildings and the land upon which they were erected as security for the amount due them for work \* \* \* is the "creation of statute" and was unknown either at common law or in equity \* \* \* none were ever known or to this day are found upon the statute books of Great Britain, securing in any manner to the mechanic a lien on the buildings their industry \* \* \* has contributed to erect.

The first attempt to create a mechanic's lien arose from a desire to establish and improve as speedily as possible the city of Washington as the permanent seat of government of the United States. At a meeting of the commission for that purpose, Sept. 8, 1791, \* \* \* a memorial was adopted urging the general assembly of

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<sup>13</sup> There is no express provision in our constitutions as to "freedom of contract."

<sup>14</sup> See Secs. 1, 7.

Maryland to pass an act securing to master builders a lien on houses erected and land occupied, which was, during the same year followed by the passage of a law as requested. \* \* \* The next statute on the subject was passed by the legislature of Pennsylvania in the year 1803. These statutes, while they contained the germ of subsequent legislation on the subject, are imperfect and meager in comparison with the state of the law at the present time. The whole subject has been one of gradual growth extending from the imperfect and limited enactments \* \* \* to the established policy of all the States.

Our free school system had also become a medium for the education of the masses, and, though we may not class these acts as distinctly labor laws, yet they have played a very important part in the evolution under consideration. With higher education and a higher regard for the laborer, both social and political, the oppressive length of working hours was next brought to the minds of legislators. The laborer demanded that the hours of labor be so reduced that his might not be entirely a life of drudgery, and that he might have time for recreation and refinement. This agitation inaugurated the fourth step in the course of labor legislation. Beginning early in the century, it did not receive the sanction of government till 1840, when President Van Buren issued his order "that all public establishments will hereafter be regulated as to working hours by the ten-hour system." The first legislative act upon the subject was passed in 1866 by the legislature of Massachusetts, which only limited the hours of labor of minors in manufacturing establishments and made provision for their education.

Although until within the last twenty years very little, besides that already mentioned, was accomplished along the line of labor legislation, and of this by far the greater part was enacted within the last ten, yet with free schools, *freedom* of contract, freedom of association, protection

from unfavorable competition and security for wages in the product of toil, as fundamental principles established at the very inception of our government, with the enlargement of electoral privileges, making the laborer the controlling political factor, with a decrease in the hours of toil, both by voluntary agreement and by act of government, the United States has reared upon this foundation a superstructure which has not only led to better and more favorable consideration of the toiler in other lands, but which stands as a monument to the true greatness of democratic government. Our laws decreasing the time of service, protecting labor against unfavorable competition and against intimidation, providing for the security and payment of wages, relating to the health and well-being of employees and providing for their safety and education have been the special subject of recent legislation.

The laws decreasing the time of service may be regarded as of three classes, viz., those shortening the hours of labor per day, those increasing the number of holidays, those relative to Sunday observance.<sup>15</sup> We have four National holidays: New Year's day, Independence day, Thanksgiving day and Christmas. The various State legislatures have very generally recognized Washington's birthday and Lincoln's birthday; Arbor day is celebrated by many; others make special provisions for a whole or partial holiday on election day, and in twenty-one of the States a special day has been set apart as Labor day, which is devoted to a consideration of the interests of labor.<sup>16</sup>

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<sup>15</sup> There may be some question as to the evolution of the Sunday laws. About forty States at present have laws making Sunday labor punishable. Whatever be the motive or tendency, it cannot be denied that the legal requirements, as well as the customary observance, has had much to do with the condition of the laboring classes.

<sup>16</sup> Those recognizing Labor day are as follows: Ala., Colo., Conn., Del., Fla., Ga., Ia., Mass., Minn., Neb., N. H., N. J., N. Y., Ohio, Ore., Penn., R. I., S. C., Tex., Utah, Wash.

The laws shortening the hours of labor per day may be classified as those applying to male adults, those applying to women and those applying to minors and children. Those applying to male adults establish the legal day of labor, in absence of a contract to the contrary,<sup>17</sup> at ten hours in five of the States and at eight in six others in private occupations, except agricultural and domestic, while in public employment the eight-hour system has been established in nine and the nine-hour system in two. There are twelve States having laws restricting the hours of labor for adult women, twenty-two restricting the hours of labor for minors and children in factories, and sixteen making like provision as to mines.

We find no less than six classes of legislative acts designed to protect laborers against unfavorable competition besides the tariff acts already mentioned. Our National legislature has passed laws prohibiting pauper and criminal immigration, the importation of foreign contract labor, and an anti-Chinese law; and a political movement is now on foot still further to restrict immigration of a dangerous or unfavorable class.<sup>18</sup> The va-

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<sup>17</sup> Some of the laws have made the legal day of labor absolute, but such laws have usually been held unconstitutional.

<sup>18</sup> The acts of Feb. 19, 1862, Feb. 9, 1869, and March 3, 1875, were directed against the "coolie" labor from China and Japan and against contract labor. The act of Aug. 3, 1882, provided for the inspection of vessels, and, further, that "if on such examination there should be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a charge they shall report the same to the collector of such port and the person shall not be permitted to land."

July 5, 1884, after a violent political agitation on the west coast, an act was passed prohibiting the landing or immigration of Chinese laborers for ten years. Feb. 26, 1885—23 Stat. L., p. 332—an act was passed which provided that "from and after the passage of this act it shall be unlawful for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation, or in any manner assist or encourage the importation or immigration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories or the District of Columbia, under contract or

rious State legislatures, acting within their scope of the problem, have taken up the subject of local protection. The laws relating to convict labor, although of the greatest variety, have a very marked tendency in this direction. In many of the States the contract system is prohibited.<sup>19</sup>

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agreement, parol or special, express or implied, made previous to the importation or immigration of such alien or aliens, foreigner or foreigners, to perform labor of any kind in the United States, its Territories or the District of Columbia," and made all contracts of this kind void.

Nov. 3, 1891—26 Stat. L., 1084—"That the following class of aliens shall be excluded from admission into the United States in accordance with the existing acts regulating immigration other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, etc.," and in Sec. 3, "That it shall be deemed a violation of said act of February 26th, 1885, to assist or encourage the importation or immigration of any alien by any promise of employment through advertisements, printed or published in any foreign country, and any alien coming to this country in consequence of such an advertisement shall be treated as coming under a contract as contemplated in said act."

To facilitate the enforcement of these acts, Congress provided, March 3, 1893—27 Stat. L., 569—that "it shall be the duty of the master or commanding officer of the steamer or sailing vessel having said immigrants on board, to deliver to the inspector of immigration, at the port, lists or manifests made at the time and place of embarkation of such alien immigrants on board such steamer or vessel, which shall, in answer to questions at the top of said lists, state, as to each immigrant, the full name, age, and sex; whether married or single; the calling or occupation; whether able to read or write; the nationality; the last residence; the seaport for landing in the United States; the final destination, if any, beyond the seaport of landing; whether having a ticket through to such destination; whether the immigrant has paid his own passage or whether it has been paid by other persons or by any corporation, society, municipality or government; whether in possession of money, and if so, whether upwards of thirty dollars or less; \* \* \* whether ever before in the United States, and if so, when and where; whether ever in prison, in almshouse or supported by charity; \* \* \* whether under contract, express or implied, to perform labor in the United States," and providing further that each person shall be given a ticket of identification on arrival.

<sup>19</sup> Cal., Const., Art. X, Sec. 6; Colo., Laws 1887, p. 232; Dist. Col., R. S. of U. S. relative to, Ch. 35; Iowa, McCl. Ann. Stat. 1884, Secs. 4737-8; Mass., Laws 1887, Ch. 447; Mont., Const., Art. XVIII; N. J., Supl. Stat. 1886, p. 969, Secs. 17-26; N. Y., Rev. Stat. 1881, p. 2615, Sec. 97, Acts 1884, Ch. 21, Sec. 1;

Others have provided that convict laborers shall be employed only within the prison walls or on government works.<sup>20</sup> It is provided in Maine—Stat. 1887, ch. 149, sec. 3—that “so far as practicable, the industries upon which said convicts shall be employed, shall be the manufacture of articles not otherwise manufactured in the State,” and in Michigan—cons., art. 18, sec. 3—that “no mechanical trade shall hereafter be taught to convicts in the State prison of this State except the manufacture of those articles of which the chief supply for home consumption is imported from other States or countries.” The laws above referred to are intended to protect the free laborer from competition with criminals, and, whatever may be said about their propriety, they are indicative of the frame of the legislative mind. The State of New Jersey has taken another view of convict labor laws. Section 4 of the Rev. Stat. 1877, p. 1117, provides that:

In order to encourage industrious and proper habits, a separate account shall be opened and kept in books provided for that purpose for each convict, in which he shall be credited with the amount of labor performed by him and above what, in the opinion of the keeper and acting inspectors, he ought to perform, due regard being had to his ability to labor, which sums so credited, shall, at the discharge of the convict, be paid to him or laid out in decent raiment for him, or otherwise applied to his

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Penn., Acts 1887, No. 30, Sec. 11; Wash., Const., Art. 2, Sec. 29; Wyo., Rev. Stat. 1887, Sec. 3373. The same provision is made relative to convicts of the United States.—Stat. L., Ch. 213, Secs. 1-2.

<sup>20</sup> Ariz., Rev. Stat. 1887, Sec. 2424; Del., Code 1874, Ch. 133, Sec. 6; Ida., Const., Art. XIII, Sec. 3; Penn., Code, Secs. 8500, 8541; Ill., Ann. Stat. 1885, Ch. 108, par. 45; Ia., Laws 1880, p. 1156, Sec. 1; Kans., Comp. Laws 1885, Sec. 3688; La., Voorhees' Rev. Laws 1870, 2d Ed., Sec. 2855—Acts 1875, Act No. 22, Sec. 1; Md., Laws 1890, Ch. 590; Mo., Rev. Stat. 1889, Sec. 7238; Miss., Laws 1880, Ch. 40, Sec. 3; Wyo., Rev. Stat. 1887, Sec. 3373-4.

use, \* \* \* but no credit shall be given \* \* \* to any convict whose weekly earnings do not exceed the whole weekly expense of his maintenance in prison.

This is a recognition of the right of the convict, as a member of the State, to labor and receive the profits thereof. The various provisions restrictive and prohibitive of child and female labor are, though not primarily passed for that purpose, a protection to male adult labor in that these restrictions tend to uphold or raise the price of labor, a principle recognized by economists in what is known as the wage-fund doctrine. The provisions requiring day labor to be employed on public works are intended as a protection against the competition of contract labor. The recent laws passed in Massachusetts, Pennsylvania, New York and Illinois against "sweat-shops" and the "sweating system" are directed toward the same end.

When our industrial system was less complex, and before the centralization of capital in the hands of the entrepreneur, legislation against intimidation on the part of the employer was scarcely necessary. Elections, viva voce and by other methods, were quite general. Nothing better illustrates the effect of the industrial evolution on legislation. So similar are the provision of the later acts, and especially since the adoption of the Australian ballot, that we incorporate Sec. 7065, Smith and Benedict Rev. Stat., Ohio, 6th Ed., to indicate the extent to which they have generally gone. "If an employer of laborers, or agent of such employer, threatens to withhold the wages of, or to dismiss from service, any laborer in his employ, or refuses to allow to such employee time to attend the election and vote. \* \* \* shall be fined not more than two thousand nor less than one hundred dollars, or imprisoned in the penitentiary not more than three years.

Section 109 of the penal code of Montana illustrates



the advance position taken in protecting the laborer against intimidation by the employer:

It shall be unlawful for any employer, in paying the employees the salary or wages due them, to inclose their pay in "pay envelopes" upon which there is written or printed any political mottoes, devices or arguments containing threats, express or implied, intended or calculated to influence the opinions or actions of such employees. Nor shall it be lawful for any employer, within ninety days of general election, to put up, or exhibit in his factory, workshop or other establishment or place where his employees may be working any hand bill or placard containing any threat, notice or information that in case any particular ticket or candidate shall be elected work in his place or establishment will cease, in whole or in part, or his establishment be closed up or the wages of his workmen be reduced, or other threat, express or implied, intended or calculated to influence the political opinions or actions of his employees. This section shall apply to corporations as well as individuals, and any person or corporation violating the provisions of this section shall be guilty of a misdemeanor, and any corporation violating the same shall forfeit its charter.

We have already mentioned the lien laws passed for the purpose of security and payment of wages. It is only necessary in this particular further to say that nearly every species of property which is the subject of toil is the subject of lien also. For instance, in the State of Washington, a laborer has a right of lien upon all buildings and the land upon which they are situated, mines, ditches, flumes, dykes, machinery, railroads, shingles and lumber, logs, steamboats and other water craft, docks and wharves, farm produce and many other things, besides the common law lien on personal property, in possession, upon which labor or a service has been performed; and as to labor on public property the contractors are required to furnish a bond for the security *and* payment of labor claims.

Besides the lien laws, almost every State in the Union has laws making claims for labor preferred claims in cases of insolvency, assignment, estates of decedents, etc. Very many of the States have laws requiring that corporations and institutions employing above a certain number of men shall make payment at stated periods, as weekly, fortnightly or monthly,<sup>21</sup> and the laws against the truck system have been passed in about fifteen of the States.<sup>22</sup> Statutes have been passed making it unlawful for railroads and mining companies to conduct or have any interest in stores.<sup>23</sup>

It has been enacted that, in case labor is not paid within thirty days, a receiver may be appointed;<sup>24</sup> in Michigan that a judgment for labor cannot be stayed;<sup>25</sup> in Missouri and other States that notice be given of a reduction of wages; in New Jersey that the labor of convicts shall be for their own benefit; in New York that there shall be no costs in suits for wages for less than fifty

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<sup>21</sup> Those requiring weekly payments: N. H., 180, 21; Mass., 194, 508, 51, 1895, 438; R. I., 1891, 918; Conn., 1749; N. Y., 1890, 388, 1895, 791; Ind., 1893, 114, R. S., 7059 (as to mining and manufacturing companies only); Ill., 1891, p. 213; Wis., 1889, 474; Kans., 1893, 187. Fortnightly: Me., 1887, 214, R. S., 8769; Wyo., 1891, 82; W. Va., Code, p. 1003, Sec. 2. Monthly: Va., 1887, 391, 1-2; Ind., R. S., 1756; Mo., 2538; Tenn., Ex. Ses. 1891, p. 5. Weekly or monthly: Cal., 1891, 146; in Connecticut 80 per cent only need be paid weekly, the balance monthly. Conn., 1750. (Stimson, H. B. of Lab. Laws, p. 87.)

<sup>22</sup> Several of the States have, however, declared these laws unconstitutional.

<sup>23</sup> Md., Code 1888, Sec. 202, Art. XXIII: "No railroad or mining company, formed or organized under any of the provisions of this article, or which has organized under any of the existing laws, charter or acts of the general assembly of this State, shall own, conduct or carry on any store, or any interest in any store, or receive any portion of the profits thereof, but nothing herein contained shall prevent the employees of any corporation from forming a co-operative store."

<sup>24</sup> Md., Code 1888, Art. XII, Sec. 145.

<sup>25</sup> Act No. 147 of the Laws of 1887. See also R. S. of U. S. relative to Dist. of Col., Sec. 1025; McClaie's Ann. Stat. of Ia., Ed. 1884, Tit. XVIII, Ch. 2; Brightly's Dig. of Penn., 1885, p. 1698, Amend. Ch., 228, Laws 1887.

dollars and nearly all of the States have laws exempting wages from execution and attachment.

As to the health of laborers, many provisions have been made, such as those requiring seats for females in stores and factories, seats for street car drivers, providing for hospitals, physicians, etc., and the various mine and factory laws regulating ventilation and prescribing other sanitary conditions are all intended to promote the general welfare.

The regulation of factories and mines, the provisions requiring the inspection of boilers and machinery and the legislation as to the liability of corporations for injury to employees provide for the safety of the laborer.

Thirty-three of the States have established bureaus of statistics, labor commissions, etc., for the purpose of furnishing to the public reliable information as to the condition and needs of labor, under this new and constantly changing order of things, which, together with the United States Department of Labor, have had a very large influence on recent legislation. By their efforts the public has become acquainted with many abuses and unfavorable conditions that otherwise might have remained wholly unnoticed. The information thus obtained, relative to wages and prices, slums, tenements, factory regulations and abuses, strikes and other subjects, has been put into the hands of the elector and the legislator as material with which to work intelligently and that they may better apprehend the social and industrial conditions. In order that the scope and extent of the laws affecting capital and labor may be more clearly set forth than has been possible in this short sketch, we hereto append a schedule.<sup>26</sup>

While the subject in hand is one concerning the modifications of law relative to capital and labor, it may also be of some interest briefly to notice the attitude of our

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<sup>26</sup> See Schedule, Appendix IV.

courts in construing these laws and passing on their validity. We have already noticed something of their attitude relative to the constitutional right of freedom of contract. This principle is of especial interest here, as it has been involved in, has been the turning point of, most of the decisions on the subject. The general theory of law is that freedom of contract is a constitutional right and therefore cannot be impaired by ordinary legislation. In support of this contention some of the courts have invoked one constitutional provision and some another; some have gone behind written constitutions and found their authority in the unwritten constitution of England. Whatever be the reason urged, the courts being unanimous in the holding that it is a constitutional right, it has followed, in their process of reasoning, that the only power which the legislature can exercise in restraint of this right is the police power. Another constitutional principle that has stood in the way of labor legislation is the constitutional prohibition of "class legislation." An example of the operation of these principles is found in the decision of the Supreme Court of Nebraska.<sup>27</sup> The legislature had passed a law (Laws 1891, ch. 54) which provided that eight hours should constitute a legal day's work for all classes of mechanics, servants and laborers throughout the State of Nebraska, excepting those engaged in farm and domestic labor, and that any employer or corporation working their employees over the time specified should pay, as extra compensation, double the amount per hour paid for previous hours. This law was held unconstitutional, both on the ground that it denied freedom of contract and that it made a class distinction against farm and domestic labor. There are many other cases holding laws prescribing the hours of labor, prohibiting the "truck" system, fixing the time of

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<sup>27</sup> *Low v. Reese Printing Co.*, 59 N. W. Rep., 762.

payment of wages and giving labor special privileges unconstitutional on one or the other or both of these grounds. When we come to consider these decisions in the light of judicial reason it would appear that the better class of authorities and the best considered cases, from a standpoint of the logic of our institutions, hold that a law which applies to all members of a certain class within the State does not come within the constitutional prohibition of "class legislation." The principle of "freedom of contract," which has been so firmly held to in the cases above mentioned, has certainly been seriously impaired in other respects. For instance, the homestead laws, especially of Texas, which make a mortgage on a homestead absolutely void; the laws regulating the time of employment of women, which have scarcely been questioned; the laws providing for an equity of redemption in mortgaged estates and other laws in restraint of alienation; the laws of assignment and bankruptcy, allowing obligations to be liquidated upon payment of a certain per cent of the amount due. The principle of public policy has operated to deny the enforcement of contracts in waiver of the right of redemption and the statute of limitations, contracts limiting the liability of common carriers and in restraint of trade, such as a contract to refrain from conducting a certain kind of business.<sup>28</sup> None of these could be said to come within the scope of the police power unless we give to that power a wider scope than is usually given, and yet they are all limitations upon the right of contract. Mr. Stimson<sup>29</sup> carries the doctrine so far as to hold that "it is

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<sup>28</sup> In *Oregon Steam Nav. Co. v. Winston*, 20 Wall. (U. S.), 64, the court said that there are two grounds upon which the doctrine that a contract in restraint of trade is void as against public policy—1st, the injury to the public by being deprived of the restrained party's industry; 2d, the injury to the party himself by being precluded from pursuing his occupation, thus preventing him from supporting himself and family.

<sup>29</sup> *Hand Book of Labor Laws*, p. 40.

possible that a statute requiring municipal corporations to pay not more than a certain sum (for wages) would also be held unconstitutional in favor of the city or town resisting it;" and, further, speaking of the towns in the New England States fixing the price they would pay to unskilled labor, that "such resolutions have not commonly been questioned, though it may be doubted whether town officers are governed thereby." This position seems quite untenable, as it is a well-established principle that the various officers and agents of government, under our system, can only act within the powers granted them; that they, as officers, are purely creatures of law and prescribed in their action by the law; that such provisions as those mentioned only prescribe the kind of contract that the State, through its officers can make, and unless they operated to prevent the operation of governmental functions there seems no reason why officers, as the agents of the State, should not be bound.

When we consider that the scope of "police power" is wholly undefined, even in the minds of jurists—it not having been reduced to any stated principle, its scope really residing in the mind of the court applying it—when we consider that there have been many invasions of the right to freedom of contract on other grounds than that of police regulation which have been supported by the courts, and when we further consider that in the several States many legislative restrictions upon contracts relative to capital and labor have been upheld or been allowed to stand for years unquestioned, the courts in the future may perhaps be pardoned for looking for some other ground than that heretofore taken for declaring legislation of this character unconstitutional. It may be safely predicated that courts, as well as legislatures, are largely the product of the age; that their environment is reflected in their decisions; that public policy and the demands of the general welfare will modify

precedents, make prominent other principles and carry the courts along with what seems to be the necessary trend of legislation. Under the present highly organized industrial system capital and labor are separated; privity of contract is not between the capitalist and the laborer but with an entrepreneur, who is often in control of large interests. He himself is often financially irresponsible. Under a regime in which enormous accumulations of capital are controlled by a few and in which industrial organization is largely of a corporate character, with this changed and ever changing environment, it becomes necessary that the established order, the law, should also change in order that essential justice may be maintained. This seems to be the tendency of law under our free institutions. The remarkable evolution that has taken place, and which in this cursory manner we have sought to trace, is the reflection of environment. The logic of events which made this adaptation necessary requires that the machinery of government should support it.

The status of the laborer has been changed; the attitude of society reversed. Instead of being considered a serf, existing for the benefit of his master or employer, he is a citizen with equal rights. Instead of being regarded as an inferior he is looked upon as a peer. Labor is no longer ignominious as of old, but to-day, he is most highly respected who is the greatest servant of society. It was by unremitting toil that a foothold was gained upon this continent, and ever since "work" has been the watchword of our American society. It was by hard work that the pioneer pushed his way out into the forests and carved out his new home; it was work that transformed this continent from a broad expanse of wilderness to a grand mosaic of fertile fields and happy homes; it is work that has, during the last fifty years, *brought us out from an insignificant place among nations*

to be the wealthiest and most resourceful on the face of the earth. It is toward the sluggard, the breather in indolence, whether he be lord, duke, "remittance man" snob, dude or tramp, that society to-day points the finger of scorn. Standing upon the high plain of equity, which was established during the colonial period, the tendency has been to constantly adapt our legal system to the social and industrial environment. As the social and industrial conditions become modified, our lawmakers, being dependent upon the laborer, the capitalist and the undertaker alike for support, constantly seek adaptations which will render justice toward all according to the highest political consciousness of the State. We claim no Eutopia. We do not assert either unanimity or perfection in our laws; but the tendency is plainly to be seen. There are many conditions that we might wish otherwise, many new questions to be solved in our relations one with another as our civilization progresses, but with our present system of co-operative government, our higher standards of education and our better knowledge of existing conditions the result is assured.

## II.

### DEBTOR AND CREDITOR.

Unfortunately, our laws governing the relation of debtor and creditor at the time of the establishment of our independence had also come from England. Severe as were the laws of other nations, as stated by Grahame,<sup>30</sup> "no modern nation had ever enacted or inflicted greater legal severities upon debtors. That jealous regard for liberty and national honor, that generous concern for the rights of human nature which the English have al-

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<sup>30</sup> Grahame's Hist., Vol. III, p. 179.



ways claimed as distinguishing features of their character, had proved unable to withstand the most sordid and inhuman suggestions of commercial ambition. For the enlargement of their commerce they sanctioned the atrocities of the slave trade, and for the encouragement of that ready credit by which commercial enterprise is promoted, they armed the creditor of insolvent debtors with vindictive powers, by the exercise of which freeborn Englishmen, unconvicted of crime, were frequently subjected to a thralldom as vile and afflicting as the bondage of negro slaves in the West Indies." Even this portrayal of the legal status and condition of those who, by misfortune, mismanagement, or failure in business judgment, had become insolvent does not paint the picture black enough. Lord Townsend is recorded as saying:<sup>31</sup> "The case of many insolvent debtors was, by the unmercifulness of their creditors, worse than that of galley slaves who were provided for and kept clean, whereas in England they are in a starving condition and rotting in a gaol." Again says Grahame: "So long was it, before English sense and humanity were fully awakened to the guilt and mischief of their barbarous legal system and its still more barbarous administration, that, till a late period in the eighteenth century, misfortunes in trade exposed an Englishman to a punishment more dreadful than the nineteenth century would suffer to be inflicted upon the most infamous and detestable offenders." Says May:<sup>32</sup> "By imprisonment restitution was made impossible. A man was torn from his trade and industry and buried in a dungeon. The penalty of an unpaid debt was imprisonment for life. \* \* \* He might become insane or dangerously sick, but the court was unable to give him liberty." Among other cases we have recorded that of a

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<sup>31</sup> Cobbette's Parl. Hist., Vol. VIII, p. 680.

<sup>32</sup> Const. Hist. of Eng., Vol. II, p. 269.

woman dying in jail, after an imprisonment of forty-five years, for a debt of nineteen pounds.<sup>33</sup> Even the philanthropy of Oglethorpe released the English debtor only at the expense of expatriation; but, though broken in spirit, overcome by vicissitude, with blighted hope and a fallen pride, in order that he might take his wife and little ones away from the scenes of their misfortunes, away from penury and want, and begin life anew where nature, though oftentimes severe, was yet more kind than his fellow-men, and where, though surrounded by savages and the dangers of the frontier—this was to him far preferable to the almshouse for his family and the prison for himself. Coming to this country, however, he did not escape from the vigor of debtor laws. Even in Georgia, that land “born of philanthropy, cradled by benevolence and guarded by valor,” the debtor’s lot was a hard one. The colonists had brought with them a legal system which had upon it the stamp of ancient commercial barbarity and sordid cruelty. This, though modified from time to time, was retained till about the time of the revolution. In order that we may get a fair view of the status at that time and immediately prior thereto, we quote from the laws of New York (1774) the following:

Whereas, it has been represented to the General Assembly that the several persons in the different gaols in this colony are destitute even of the common necessities of life, and it is considered reasonable that, if their creditors will not consent to their enlargement or contribute to their subsistence, that such persons shall be released by the legislature, and to this end be it enacted, that such of the creditors of the following named persons [naming those confined] who shall insist upon their debtors being detained \* \* \* shall agree in writing, under their hand and seal, to pay and allow three shillings and sixpence per week unto said persons respectively \* \* \*

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<sup>33</sup> Reports of 1792, Com. Jour. XI, VII, 647.

the said prisoners whose creditors shall not enter into such an agreement \* \* \* shall be entitled to the benefits of this act.

The act then provides for the insolvent prisoner filing an inventory of property and an assignment thereof and upon petition to the court being released. "Provided, That this act shall not apply to Crown cases nor creditors residing in Great Britain." By reason of its extended commercial dealings, its intimate relation with England, and its very tardy but gradual progress, let us follow the evolution of the law in New York.

1784—April 17.—The assembly passed an act whereby imprisoned debtors generally might make an inventory of all property and an assignment of the same and by petition be released from custody and debt.

1784—Nov. 24—and April 25, 1785.—This act was extended to those not in confinement.


1786.—A similar act was passed allowing the debtor to retain wearing apparel and bedding for himself and family.

1787.—The act of '86 was extended so that any surplus in the debtor's estate might be returned.

Then the influence of the creditor class and complaints from England produced a retrograde movement and with a "whereas, it has been found that the act entitled 'an act for the relief of insolvent debtors' has been productive of much mischief" the same was repealed Feb. 8, 1788, and March 21, 1788, an act was passed whereby a debtor might be discharged upon the petition of three-fourths, in value, of his creditors, and upon a complete assignment of property, to be released from custody.

1791—May 10.—The benefits of this act were extended, upon their own petition, to debtors who have been imprisoned one year.

1799—April 2.—Extended the benefits of the act to those who had been imprisoned three months.



1801—March 24.—An act passed providing for the discharge from custody after thirty days those owing \$25 and after three months those owing \$500 or more upon petition and assignment.

1813.—An act with similar provisions.

1817.—The legislature passed an act to compel assignments by imprisoned debtors.

1819.—An act providing for voluntary assignment for the purpose of avoiding or exonerating the debtor from liability of imprisonment.

1830.—A provision was made for prisoners arrested upon civil process being kept in a room separate from those detained on criminal charge. That females shall not be imprisoned for breach of contract. That soldiers of the revolution shall not be imprisoned for debt.

1831—April 26.—An act was passed to abolish imprisonment for debt and to punish fraudulent debtors.

Such is the history of the law of imprisonment in New York, and such, in general, the history of the law in the other States.

After the declaration of independence most of the States incorporated in their constitutions prohibitions against imprisonment for debt. At first provisions were made that there should be no imprisonment for debt where there did not exist strong "presumption" of fraud and the debtor had not sought to avoid an assignment for his creditors. Chronologically they appear as follows: (1776) North Carolina, (1776) Pennsylvania, (1777) Vermont, (1792) Kentucky, (1796) Tennessee, (1798) Georgia, (1802) Ohio, (1816) Ohio, (1817) Mississippi, (1819) Alabama, (1836) Arkansas, (1865) Missouri, (1866) Nebraska.

Then the State constitutions prohibited imprisonment for debt, except where fraud "actually exists," as fol-

lows: (1849) California, (1855) Kansas, (1857) Iowa, (1857) Minnesota, (1868) South Carolina. This list of constitutional provisions was gradually added to until at this time it includes about one-half of the States. In about one-fourth of the States imprisonment for debt is absolutely abolished, and those not having constitutional prohibitions have conserved the same end by statute.

With the constitutional and legislative measures protecting the debtor against imprisonment the work was only begun. By gradual evolution the debtor has been allowed to have a release from the civil demands of his creditors and from judgments against him through bankruptcy and insolvency proceedings. As to legislative provisions for insolvency we will not state in detail the evolution in the several States or as shown by the States collectively. It is only necessary to say that all States have laws upon this subject. In times of National distress Congress has passed bankruptcy laws to give uniformity throughout the States. Many of the States allow a discharge upon payment of fifty per cent of the indebtedness, while others a complete discharge by simply assigning and pro rating property among creditors.

Nor does the law allow the creditor to take all of the property of his debtor. During the last few years our homestead and exemption laws have grown until at present every State and territory has protected the debtor against levies upon the property and implements considered necessary for the support and maintenance of himself and family. The evolution of this class of legislation is very interesting and cannot be better shown than by referring to the laws themselves. From these the homestead exemptions appear as follows:

## HOMESTEAD EXEMPTIONS.

## AMOUNTS EXEMPT.

None.	\$100.	\$500.	\$600.	\$1,000.	\$1,500.	\$1,600.
Mass.	Md.	N. H.	Ind.	Utah*	Mich.	Ga.
Penn.		Ver.		W. Va.	Mo.	
R. I.				Tenn.	Wyo.	
Del.				S. Car.		
D. C.				Ohio		
				N. Y.		
				N. Mex.		
				N. J.		
				Ky.		
				Ill.		
				Conn.		
\$2,000.	\$2,500.	\$4,000.	\$5,000.	Unlim.	Specif'd.	
Ala.	Ark.	Ari.	Idaho	Cal.	Fla.	
Colo.			Neb.	N. Car.	Kans.	
La.			S. Dak.		N. Dak.	
Nev.			Tex.		Wis.	
Wash.					Ia.	
Va.					Me.	

\*Utah, \$1,000 for debtor, \$500 for wife, \$250 for each other member of family.

Generally speaking, those older States that have their laws crystallized around ideas of decades past, are representative of the status of that period, while the newer ones, abreast with the thought and ideas of the times, reveal the present. In most of them the only way that a homestead can be lost by process of law is by a mortgage or for labor lien. The State of Texas, however, has taken an advanced position. There a mortgage upon a homestead is made absolutely void and the mortgagee must treat his claim as an ordinary money obligation. This seems a most wholesome provision, for the reason that many have lost their homes for sums much less than their actual value by giving mortgages thereon in times of increased business activity, when great inducement is

offered to investment; in times of business relapse and prostration they have been unable to sell at any price; consequently they have been required to let the homestead go with the mortgage. The tendency in all of the States seems to be to enlargement and better security of the homestead exemptions.

Examining the personal property exemptions, while we find them even more varied, yet they are more general. They have been employed in every State. We give a synopsis and extracts from only a few, which are representative of the evolution and tendency of the law in this particular:

### Maryland.

Cons. Art. 3, Sec. 44.—Laws shall be passed by the general assembly to protect from execution a reasonable amount of the debtor's property, not exceeding in value the amount of five hundred dollars.

Code, 1888, Art. 83, Sec. 8.—One hundred dollars' worth of property of each defendant therein shall be exempt from execution issued in any judgment in any civil proceeding whatever except on judgment for breach of promise and for seduction.

Sec. 11.—All wearing apparel, mechanical text-books and books of professional men, tools of mechanics and all tools and other mechanical instruments or appliances moved or worked by hand or foot necessary for the practice of any trade or profession and used in the practice thereof, shall be exempt from execution in addition to the property above stated.

### New Hampshire.

General Laws, 1878, Chap. 224. Sec. 2.—The following goods and property are exempt from attachment and execution:

I. The wearing apparel necessary for the use of the debtor and his family.

II. Comfortable beds and bedsteads **and bedding,** necessary for the debtor, his wife and children.

III. Household furniture of the value of one hundred dollars.

IV. One cooking stove and the necessary furniture belonging to the same.

V. One sewing machine kept for the use of the debtor and his family.

VI. Provisions and fuel to the value of fifty dollars.

VII. Uniform, arms and equipment of every officer and private in the militia.

VIII. The Bibles, school books and library of any debtor, used by him or his family, to the value of two hundred dollars.

IX. One hog and one pig and the pork of the same when slaughtered.

XI. One cow; one yoke of oxen or a horse when required for farming or for teaming purposes or other actual use, and hay not to exceed four tons.

XIII. The debtor's interest in one pew in any meeting house in which he and his family usually worship.

XIV. The debtor's interest in one lot or right of burial in any cemetery.

Acts 1883, Chap. 3, Sec. 1.—Domestic fowl not exceeding fifty dollars in value.

### Colorado.

Genl. Stat., 1883. Chap. 60, Sec. 1865.—The necessary wearing apparel of every person shall be exempt from execution, writ of attachment and distress for rent.

Sec. 1866.—The following property, when owned by any person being the head of a family, and residing with the same, shall be exempt \* \* \* and such property shall continue exempt while the family of such person are removing from one place of residence to another within the State:

First—Family pictures, school books and library.

Second—A seat or pew in any house or place of public worship.

Third—Sites of burial of the dead.

Fourth—All wearing apparel of debtor and his family; all beds, bedsteads and bedding kept and used by the



debtor and his family; all stoves and appendages kept for the use of the debtor and his family; all cooking utensils and all household furniture not herein enumerated, not exceeding one hundred dollars in value.

Fifth—The provisions for the debtor and his family necessary for six months.

Sixth—The tools and implements or stock in trade of any mechanic, miner or other person used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars.

Seventh—The library and implements of any professional man not exceeding three hundred dollars

Eighth—Working animals to the value of two hundred dollars.

Ninth—One cow and calf, ten sheep, and the necessary food for all the animals herein mentioned for six months, provided or growing or both. Also one farm wagon, cart, or dray, one plow, one harrow and other farming implements, including harness and tackle for team, not exceeding fifty dollars in value.

### Texas.

Revised Statutes, 1879. Title 40, Art. 2335.—The following property shall be reserved to every family exempt from attachment, execution and every species of forced sale for the payment of debts, except as hereinafter provided:

Second—All household and kitchen furniture.

Third—Any lot or lots in a cemetery held for purpose of sepulture.

Fourth—All implements of husbandry.

Fifth—All tools, apparatus and books belonging to any trade or profession.

Sixth—The family library and all family portraits and pictures.

Seventh—Five milch cows and their calves.

Ninth—Two horses and one wagon.

Tenth—One carriage or buggy.

Eleventh—One gun.

Twelfth—Twenty hogs.

Thirteenth—Twenty head of sheep.

Fourteenth—All saddles, bridles and harness necessary for the use of the family.

Fifteenth—All provision and forage on hand for home consumption.

Sixteenth—All current wages for personal services.

In giving this very limited sketch of the evolution of the law relative to debtor and creditor it has been the aim of the author to state only facts together with the sources from which derived. He does not wish to place himself in the attitude of drawing conclusions or proposing theories. His only aim is to so get the true status and historical tendency before the mind of the reader that he may draw his own conclusions. Various theories might be offered as to where these tendencies are leading and what the logical end. Suffice it to say that we have departed from the ancient rigor of the law that had for its motto, "Let the debtor beware"—a law which gave to the creditor not only the property of the unfortunate debtor but his body also; that the law has grown more kind; that its attitude is changed; that there has been a gradual evolution. As a nation we have found that citizenship is best nurtured and virtue more firmly established in the home where there is a sufficient competence for life, for education and comfort, and that pauperism and penury is the birthplace of disease, ignorance and crime. Recognizing these facts, we have, through representatives reared up around the home and around the person and the family of the debtor legal safeguards over which not only the creditor cannot pass but, in many instances, which the debtor himself cannot tear away. A further analysis of the laws relative to debtor and creditor may be found in the appendix.

## CHAPTER XV.


PROBLEMS FOR THE DEMOCRACY OF TO-DAY, OR  
THE MODIFICATIONS STILL NECESSARY  
TO BE MADE.

We have outlined the modifications of our law and institutions in the evolution of "government for the governed." Is the adaptation complete?<sup>1</sup> Have we realized the highest ideals of the State organized according to the principles of the general welfare? The murmurings and dissatisfactions of our people tell us that we have not. We have but to look about us to know that all is not well—that the edifice which was begun by our fathers is not yet completely adapted to the environment in which we live, that there is still work for us to do as citizens of a great democratic nation. What is the work, what the changes to be made in order to adapt our political institutions to the end in view? These are the problems which the people in their sovereign capacity have before them for solution.

In tracing the evolution of the past our laws and con-

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<sup>1</sup> It must not be thought that any political system can be brought to such a state of perfection that no further change will be required. We live in a universe of changing environment, and political institutions, like other forms of life, must grow; that growth must be a continual adaptation to the conditions of highest well-being of the society which sustains it. It is in this sense that completeness or perfection must be understood. It was affirmed in the time of our fathers that "eternal vigilance is the price of liberty." Liberty, in this sense, signifies the attainment of the highest advantage for life. Eternal vigilance is required in order that we may so adapt our institutions to the conditions of highest advantage that the individual may not suffer. This is a constant duty imposed on every individual endowed with thought and reason—a biological law that cannot be violated without loss.



stitutions have served as landmarks. In attempting to define the problems of the present we must rely on popular judgment. The general welfare is our standard. In attempting to measure institutions by this norm we can only express an individual judgment. Popular opinion must be the arbiter both of the question of necessity for change and of the expediency of the modifications proposed. Without arrogating any claim to originality or superior judgment, either in the discovery of causes or in the solution of problems presented, the writer has, in the present chapter, assumed to give expression to his observations and conclusions, in the form of suggestions as to the modifications of law which still seem necessary to be made in order to adjust our political system to the well-being of society.

The conditions that at present confront us, which make further modifications necessary, may be formulated and stated as follows: First, incompetency in office; second, inequality in elections; third, the employment of the spoils system in appointments; fourth, the corruption of our legislatures; fifth, the subversion of municipal government in the interest of organized spoliation.

These indictments, when stated in such general terms, seem alarming and, unless we hold in mind the qualifications to be made, unless we view them in the light of the progress made and referred to in previous chapters, we shall be apt to say that they include all that is bad in government. When viewed from this standpoint, however, they appear as remnants only, as effects produced either by the retention of certain elements which belong to a regime of the past or by a failure to adapt our institutions to the changing conditions of the present. And the remedy in each case is not far distant or difficult of application. To adapt our institutions to our present environment, to complete the evolution of government based on the general welfare, we require nothing new

or untried. If in each case the adaptations already made or begun are extended a little further or are made general in their application, our problem will be solved.<sup>2</sup>

### I.

The first condition present demanding change, that of incompetency in office, seems to be largely attributable to the progress of the age. Again postulating the satisfaction of desire as the prime purpose of the voluntary activities of mankind, the history of the race may be regarded as a record of strife to obtain this satisfaction, the progress of civilization as the development of a broader and still broader co-operation as a means to this end. Without this broader co-operation, without division of labor, without these adaptations in the interest of economy of effort and resources, progress would have been impossible and the race must of necessity have remained in rude barbarity with very scanty means of life. But broader co-operation demands more comprehensive political organization. It would be impossible for the various members of society to co-operate for the attainment of their ends without an established order, without adherence to certain rules for the conduct of their affairs. There are also many things necessary to the highest well-being of all of the members of society that can better be provided by society at large than by individual members.<sup>3</sup>

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<sup>2</sup> It is not argued that we can apply a remedy that will be good for all time; that as a people we can adopt a panacea for all ills present and future. The ever-changing conditions of society in this age of change and progress will make new adaptations necessary from time to time. But the problems that confront us are the result of conditions present, and this is an environment to which adaptations can be made. Especially important are these adaptations when they involve the fundamental principles and purposes of our political organization.

<sup>3</sup> For example, it would be impossible for an individual or even a large business corporation to provide itself with the present means of communication without such an enormous outlay as to make it suicidal. Yet the government can do this at a very nominal cost to the individual.

As the co-operation broadens, as the industrial world becomes more thoroughly organized, as the functions of individual life become more highly differentiated, the number of services that can be advantageously performed by society is vastly increased.<sup>4</sup> Government is the necessary concomitant of industrial welfare and progress; indeed, it must be regarded as a part of industry, and a very necessary part. The State is a vast corporation having to do not only with the making of rules of order for business and administering them, but also, from necessity, with such of the productive activities as, by virtue of its broader organization and more general purpose, better adapts it to the service of all its members. Such are the conditions and such the evolution that have led to incompetency in office.

To an experienced business man a mere statement of these conditions suggests a remedy. The growth of his own business has furnished almost an exact parallel. At first a small merchant in a Western town, he knew every piece of goods in stock, its cost price, its probable market value. He did his own buying, his own selling; he needed no complicated system of books, no strict method of business. He himself was there to render a service to society by bringing such goods to market as the community might desire, and to take in exchange therefor such other things as would be of greater service to himself or his subsequent customers than the things parted with. As his business grew, finding that he alone could not

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<sup>4</sup> This fact has been forcibly illustrated during the last century when we contemplate the increasing number of government works and institutions, light, fuel, and water plants, railways, telegraph, canals; are a few of the governmental undertakings that were in the beginning of the century confined to private enterprise. Whenever any enterprise becomes so widely extended as to involve the interests of the entire community it is then a proper subject for public control and can be operated with greater advantage to the community by the government.

render such service as was demanded, he employed a clerk. But all of the acts of the clerk were under his own supervision and immediate direction, and there was still no need of modifying his system of business. But the town grew to be a city and the demands for his particular kind of service to society enlarged in proportion. Instead of a small country merchant we have a Marshall Field, with factories, wholesale and retail houses. He has purchasing agents all over the civilized world. He does a million-dollar business each week. He gives employment to thousands of men, women and children. Now Mr. Field may never see a customer or an employee. He may sit in his office and know all the while that not a button, a thimble, a spool of thread will be lost without someone being held responsible therefor. He may remain at his home a month at a time and know that his immense establishment will move on under the most competent management. How is this made possible? Why has Mr. Field been so successful while hundreds of others have failed? Go into any department of his mammoth establishment and the answer will be apparent. His business has been so well organized that each department, in its own interest, becomes a check on the other; each employee has a certain duty to perform, each act has a record, so that responsibility may be fixed. Every detail is managed with regard both for the greatest economy and the greatest safety. Go to Mr. Field and tell him of some personal service that you have rendered to him, and ask him for a position as manager of a department, and what will he say? He will inquire into your habits, your honor, your ability and your experience in doing that particular kind of work. He will find out whether you can perform that service better than any one else available. If he finds that you have not the proper habits, that you have been dishonorable *with others*, are wanting in general ability, or *have not*

had the requisite experience to insure him competent service, he may reward you in other ways for your attentions and kindness, but he will tell you that he cannot hamper his business with an incompetent employee. To use any other method would be to hazard success, to make broad co-operation impossible. Broad co-operation requires such a division of labor as will bring about the largest returns for the least cost. It also requires that every place in the co-operative system shall be filled by one competent to perform that particular service.

We have already done much to secure competence in our civil service, since 1883. The Federal service has been revolutionized, about 87,000 employees being under rules which make tests of competency rather than partisan service or "patronage" the first condition of employment. With rigid examinations as a test for merit, probation as a test for fitness, promotion as a reward for efficiency and removal as a check on incompetency the civil service, in departments where these rules have been made applicable, has steadily improved. In the States it has so far been applied only to cities and the most populous counties. The experience, not only of our own country, but also of England, France and Germany, all argues that in order to avoid incompetency the same tests must be applied to the civil service as are employed in private service. In fact, till such a plan is adopted, private co-operation will be hampered and the further extension of our civil service will be rendered impossible. For certain purposes of government we need competent engineers. Shall we entrust the lives and fortunes of the people to the favorites of the political boss? We need capable health officers, inspectors of sewers, boilers, steamboats and locomotives; shall we rely on the "ward heeler" for this service? Naval constructors and architects, ship builders, bank and postal inspectors, auditors and printers are necessary. Shall we depend on chance



and the dictates of the purveyors of spoils for the character of our service here? What is it that has rendered our service incapable and caused it to be the subject of universal reproach but a system of appointments which, if employed by any private concern, would lead to ruin?

In opposition to the merit system two arguments are used. The one is contained in the ancient adage, "To the victor belong the spoils." This, however, assumes that government is an organized system for plunder and that all things obtainable through the control of the functions of government are the rightful reward of political conquest; that the purpose of popular expression in election is that of awarding booty. Such a theory belongs to the age of pirates, freebooters, vikings and barons. If adopted by modern society retrogression is inevitable. The other argument is that the merit system will build up an office class. As long as official position is open to every citizen, male and female, who wishes to compete for a place, as long as appointments are made on merit and not on "a pull," as long as the civil service is under the direction of official heads who are elected by the people and who are made responsible to them for their own acts and the acts of their subordinates, is not this just what we want? We want the civil service placed on as high a level as private employment and as free to every citizen of the land. If one becomes fitted for a certain class of public service and prefers such service to private employment he should be given as great an opportunity to compete for the places open in that class. Do we complain because there is a salesman class, an engineer class, an accountant class? Yet the number of openings for salesmen, for engineers, for accountants, is limited, and it is only the best that can get positions, or getting, retain them. If such a theory were acted on, the whole economic system would be wrecked and society would lapse to the position it occupied centuries

ago. An office class! Our trouble is that we have no specialists, no trained agents, not enough of experienced persons, in our public service. The only way that man can become competent in any business is by experience, and the larger the experience the greater the economy of employment. One of the most faulty theories of the time has been that a year or two in office makes a better citizen. It is demoralizing. If the citizen does not intend to make public service a business, it takes him away from his regular calling for such a time as to cause irreparable loss. He is of little service to the public; he wastes so many years of his own life which might be profitably spent in the establishment of his own particular business. If he does intend to make public life a business, his entrance, as well as his continued employment should rest on merit and not on "political patronage." Adopt the merit system in all of its best forms, extend it to the entire appointive service, place it under directive official heads that are elected by the people, with no power of appointment and removal except under strict civil service rules; organize the departments of government on the same economic principle on which a large corporate establishment or business house is organized, the people being the stockholders, the elective heads the directors, the rules of appointment being such as to protect the stockholders against an incompetent service, and, as has been often demonstrated, the public service, owing to its broader organization and higher motive, will become even more efficient and more economical than private.<sup>5</sup> By years of experience in public organization and in the conduct of public affairs on the basis of merit, the democratic State will become competent to

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<sup>5</sup> The public service, when under competent management, in all matters of general industrial interest, is more economical, because it provides for a broader co-operation, and, furthermore, because the returns are to all the members of society instead of being divided to the managers in profits.

undertake any enterprise that is adjudged to be of such general interest as to demand it. As a remedy for incompetency we have but to extend our merit system.<sup>6</sup>

## II.

The second condition which demands a modification of our system,—that of inequality in elections,—grows out of the retention in our system of certain elements which belong to the regime of the past—to the polity of absolutism. In this relation our institutions were not adapted to the principle of representation. As already shown, much progress has been made. The gradual abandonment of indirect elections in the States and the evolution of the electoral plan from majority and machine rule toward representative government bespeak a successful issue of the movement. There can be little question as to the direction of the current. But this does not concern us as much as the determination of what is necessary to be done at the present time to attain the end in view—equality in elections. Specific remedies are called for, and in prescribing remedies we must treat each political malady separately. In the diagnosis of each case we will follow the methods of the pathologist—first to determine the cause, then prescribe a remedy that may serve to remove the cause of disorder and at the same time to stimulate the organs to healthful activity.

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<sup>6</sup> General welfare, being the purpose of the democratic State, this being best secured by the most competent service, acting in accord with the public will, a system of government in which the directive heads are elective and the subordinate officers are appointed and retained on a basis of merit and ability, to serve the public well in the capacity employed, would be the most democratic form of government. Of the maintenance of the "spoils" system, if domination by a machine working in the interests of a select few, a ring, is democracy, then let us have something else, whatever be its name. This, however, has all of the earmarks of absolutism except in so far as held in check by the limits of popular endurance.

The first electoral disease that demands treatment pertains to the election of United States senators. How can we overcome bribery, political trades, deadlocks, the corruption of our legislative bodies in senatorial elections? The apparent cause of the disorder is found in the "indirect election." Experience has demonstrated that a legislature is more easily controlled and more easily corrupted than the people of a whole State. It is far more easy to trade with and buy a sufficient number of legislators to control the "balance" of a small body than to control the expression of the electors of an entire State. Then, too, this method of election furnishes an added inducement for the "machine" to control the legislatures. It must be admitted that legislators are too commonly the creatures of a political machine, and when they are also made the constitutional agents for selecting United States senators the people are rendered helpless as against the spoils organization in controlling the national government. It breaks down the responsibility of the Senate completely. No more disgraceful scenes are known to our history than those involving senatorial elections. If we had the record of proceedings and the details of senatorial elections written as they have actually transpired, it would be most damning to our sense of patriotic justice and propriety. Scarcely a year passes but that the moral sense of the nation is shocked by senatorial scandals. The first element in the application of our remedy for this evil that suggests itself, the condition precedent to restoration of political health, is the abandonment of the "indirect election" of United States senators.

Before making any prescriptions for this evil, however, we will diagnose a second case quite similar to the first—the presidential election. The cause of political disorder which appeals most strongly to us in this is found in a combination of "indirect election" and the "district

system.”<sup>7</sup> The indirect election element, however, has had the corruption eliminated from it by making the “presidential electors” tools for their districts, under full instructions how to act. Indirect election without this restraint would have been destructive to the satisfactory workings of the “district system,” and the latter being of greater utility to the spoils organization, the former element was bridled by a moral obligation imposed on the presidential elector to vote for a particular candidate,—an obligation which, if broken, would carry with it such a stamp of party infidelity as to place the one who should play false to his trust in everlasting infamy. This moral fiction was not built up for the purpose of protecting the people; it is in direct contravention to the federal constitution. The framers of this instrument contemplated such freedom of choice by these electors that the best and most able man, regardless of party, would be chosen to serve as President. It was built up to protect the district system—the worst possible form of direct election, a system that has given rise to more corruption, and which more successfully paves the way to a campaign for “spoils” than any other plan known to popular government.

In this also the first element, the “indirect election,” must be pleaded as the essential cause. It is the foundation of, the condition precedent to, the district system. It is for the purpose of creating a body to serve as indirect electors that the district system is employed. It would appear, therefore, that the first element in the application of our remedy for existing evils in senatorial and presidential elections is the abandonment of “indirect elections.” Instead of the “indirect election” of senators and the vicious combination of “indirect election

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<sup>7</sup> The States are the districts employed for the purpose of electing the electoral college.

and the district system" in the election of President, direct election, or a general ticket, is suggested.

Something, however, has already been said about the "general ticket" when used as a method of electing representatives<sup>8</sup> that it has resulted in "majority rule" instead of representative government; that it gives no voice to the minority in governmental bodies. Does this objection apply to President and senators? Clearly not. In each—the presidential and the senatorial elections—only one person is to be elected. The President is the executive head of the nation. With only one officer to elect it is impossible to have proportional representation in that office. If we had an executive board instead of one man at the head of the government, as in Switzerland, we might then have some device to make that board representative. But it has seemed best to us, as a people, to have the executive power centered in a President, and it is but proper that he should be in accord with the will of the majority. Any other device would be out of harmony with popular institutions. By making the presidential election a direct one, in which the vote of every elector in the United States would have equal weight, by making it possible for the vote of one citizen to decide the election of the candidate for President, by making the vote of a citizen in the northwest county of the northwest State of the United States of equal value, in determining the result, with that of one under the direction of a Tammany "boss" or a Chicago "ward heeler," the force of the district system would be destroyed; it would give equality to each voter. The strategic points of the campaign would be shifted from a few doubtful States to each of several millions of voters; in the presidential election it would break up the whole

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<sup>8</sup> See page 292.

order of presidential campaigning for spoils, and put the people on such a vantage ground that they might successfully cope with the "machine." The same reasoning applies to the senator. He is the representative of an entire State, and as there is only one to be elected at each hustings, the vote of every citizen in the State should have equal weight in his selection. Something has been done to remedy the evil of indirect election of senators by instructing the legislators at the time of their election, or indicating by popular vote whom the people wish chosen for United States senator. But this is a mere palliative; it involves the election of representatives in an issue entirely foreign to those State policies which should be issues of State elections. Equality in the election of United States senators requires that they be elected on a general ticket by the people of an entire State.

The third electoral disorder that demands our attention is that of majority and machine rule in direct elections. The cause is found in the failure to adapt our law to the principles of equality at the polls and equal representation of electors in the deliberative bodies of the State and national governments. The several movements traced from the "general ticket" through the "district system," the "limited ballot," the "cumulative vote," and the "free ticket" have been experimental steps in the right direction, but they have each fallen short of the end. The remedy for this disorder must be such a device as will guarantee to the voter equality in electoral force, and to the State a representative governing body. It must be such that, by party management and campaign methods, the vote of one elector will not have a greater weight in the balance than that of another. It must give to each party its full voting force and a representation of that force in government.

A political party, when freed from subversive tactics and constraining methods, is a division of the people on an important issue which has come before them for an expression of opinion. In representative government the method by which popular sentiment must be expressed is through the representatives of the people chosen in popular election on these issues. Now deliberative, administrative officers, as such, have nothing to do with policies or the enactment of the popular will into law; their duty is to administer the law already established, to serve the public under the defined expression of its will; therefore these officers, as such, have nothing to do with political doctrines and popular opinion. As they act ministerially or clerically, their qualifications should be merit and fitness, not political fault. But it is highly essential that legislative and deliberative bodies should reflect the popular will in law and ordinance. When a question arises before the people and a "decision" is made thereon, the deliberative body should have the same representative strength in reflecting the popular sentiment on the question as the people who have given voice in the election. As the legislative bodies are the instruments by which these issues are framed into the law governing the social state, it is all important that in matters of party issue there should be a proportional representation.

But there are many questions of public policy arising, and much business to be transacted by these deliberative bodies, upon which no popular expression has been made, which have not engrossed the attention of parties. A wise settlement of these questions often requires the best talent. Many times questions are before the legislature involving the broadest national relations, or the most technical skill. We must, therefore, in the constitution of our legislative bodies, take into account two elements



—the choice of men of ability<sup>10</sup> and the proportional strength of parties.

Under the systems providing for election by "general ticket," the "district system," the "limited ballot," the "cumulative vote," and the "free ticket," there is a sacrifice of one or both of these elements. For this reason with each of the systems in vogue the "machine" has a marked advantage. Having in mind the correction of this evil by securing proportional representation, Mr. Johnson of Ohio, June 15, 1892, introduced the following bill into the federal house:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that members of the House of Representatives shall be voted for at large in the respective States.

Sec. 2. That any body of electors [any party] in any State may, in convention, nominate any number of candidates, not to exceed the number of seats to which such State is entitled in the House, and cause their names to be printed on its ballot.

Sec. 3. That every elector shall be entitled on his ballot to one vote each for as many persons as the State whereof he is a resident is entitled to seats in the House, and he may cumulate his votes on a less number of persons in such manner as he may choose.

Sec. 4. That the sum of all the votes cast for all the candidates in any State shall be divided by the number of seats to which such State is entitled, and the quotient to the nearest unit shall be known as the "unit of representation."

Sec. 5. That the sum of all the votes cast for all the candidates of each body of electors [each party] nominating candidates shall be severally divided by the quota of representation, and the units of the quotient thus obtained will show the number of representatives to which

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<sup>10</sup> The general ticket was introduced to overcome the evils of the district system. The representation being for the State, each voter of the State ought to have an equal voice in the selection of their representatives.

each body of electors [each party] is entitled, and if the sum of such quotients be less than the number of seats to be filled, the body of electors having the largest remainder after division of the sum of all the votes cast for all its candidates by the quota of representation, as herein specified, shall be entitled to the first vacancy, and so on until all the vacancies are filled.

Sec. 6. That the candidates of each body of electors [each party] nominating candidates and found entitled to representation under the foregoing rules, shall receive certificates of election in the order of the votes received, the candidate receiving the highest number of votes the first certificate, and so on, but in case of a tie, with but one vacancy to be filled, the matter shall be determined by lot between the candidates so tied.

Taking a hypothetical case under this law, by way of illustration, we will suppose that a certain State were entitled to ten representatives; that each of four parties should nominate a full ticket; that the total number of votes cast at the election were 1,000,000; that of these votes 420,000 were cast by the Republican party, 294,000 by the Democratic party, 196,000 by the People's party, 90,000 by the Independent party. The quota, or unit of representation, in this case would be 1,000,000 divided by 10, or 100,000. Letting the letters represent the candidates of the several parties, we will also suppose that the votes were cast as follows:

Republican.	Democratic.	People's.	Independent.
A . . . . 70,000	a . . . . 55,000	K . . . . 35,000	k . . . . 14,000
B . . . . 65,000	b . . . . 50,000	L . . . . 30,000	l . . . . 12,000
C . . . . 60,000	c . . . . 45,000	M . . . . 29,000	m . . . . 11,000
D . . . . 55,000	d . . . . 40,000	N . . . . 18,000	n . . . . 10,000
E . . . . 46,000	e . . . . 30,000	O . . . . 17,000	o . . . . 9,500
F . . . . 40,000	f . . . . 25,000	P . . . . 16,000	p . . . . 8,500
G . . . . 28,000	g . . . . 22,500	Q . . . . 15,000	q . . . . 8,000
H . . . . 25,000	h . . . . 10,500	R . . . . 14,000	r . . . . 7,000
I . . . . 20,000	i . . . . 10,000	S . . . . 12,000	s . . . . 6,000
J . . . . 11,000	j . . . . 6,000	T . . . . 10,000	t . . . . 4,000
<hr/> Tot'1420,000	<hr/> 294,000	<hr/> 196,000	<hr/> 90,000

Dividing the total number of votes cast for all of the candidates of each party by the quota or unit of representation (100,000) we would have the following quotient: The Republican party, 4.2; the Democratic party, 2.94; the People's party, 1.96; the Independent party, .9. Following out the provisions of section five in the bill above set forth, the Republican party would be entitled to four representatives, the Democratic party to two, the People's party to one. That is to say, A., B., C., and D. having received the highest number of votes in the Republican party, would be declared elected from that party; a. and b. of the Democratic party, and K. of the People's party, for like reason, would be entitled to certificates of election, making seven in all, determined by this process. The other three would be determined by "largest remainders." These in order of priority would be as follows: People's party, 96,000; Democratic party, 94,000; Independent party, 90,000, and the ones receiving certificates by this process would be L., c. and k. The representation from this State in the House of Representatives, therefore, would be as follows:

	Seats.	Electors represented.	Propor. Rep.
Republican .....	4	420,000	105,000
Democratic .....	3	294,000	98,000
People's Party .....	2	196,000	98,000
Independent .....	1	90,000*	90,000
	<hr/>	<hr/>	
	10	1,000,000	

\*Remainder.

By this system, therefore, each party whose candidates, by sum total, had received votes throughout the entire State equal to the unit of representation would have a representative. Each party would have its proportional strength represented in the House, except as varied slightly by the "remainders," and if each party nominated ten candidates each would be represented by those can-

didates who were the strongest in the party. It would appear, therefore, that this law fulfilled the conditions of a representative system of direct elections; that it provided a very close approximation to "equality of voting strength to each elector" who participated in the elections and equal representation of the electors in the deliberative bodies of the government; that it also had in mind both men and parties.

But in order to accomplish this result we have supposed that each party had nominated a full ticket. The bill provides that each voter shall have a right "to cumulate his votes on a less number of persons in such manner as he may choose." In this appears the chief fault of Mr. Johnson's plan. Experience has shown that wherever the cumulative vote is used the party managers will not nominate a full ticket. They will nominate only such a number as they have a reasonable hope of electing. The effect is that most of those who are nominated by the machine are practically certain of election. This completely destroys both the independence of the voter and the chief purpose of an election.

Another defect of the bill is that only one method of nomination is provided, that of convention, so that the party managers having secured control of this, the people would be helpless. The plan proposed by Mr. Johnson, therefore, would be an excellent device for the purposes of the "managers," and this is one of the things that we are seeking to avoid. For example, suppose that the "machines" of the several parties had nominated candidates as follows: F., G., H., I. and J. for the Republicans; g., h., i. and j. for the Democrats; R., S. and T. for the Populists, and s. and t. for the Independents. What could the people have done? The election of all but one of the nominees from each party would have been practically certain, and for an elector to "scratch" his party candidate would have been of little avail, as the oppo-

sition would have machine men as well. To be sure, the bill contemplates a "free ticket," but "freedom in this case" is almost wholly precluded by the party managers. The "cumulative vote with the free ticket" has worked very successfully in Switzerland, but there the "machine" has not obtained as full a sway.

A plan which aims at the correction of this fault has been drafted by a committee of the American Proportional Representation League, at Saratoga, composed of Professor J. R. Commons, Syracuse University, J. W. Jenks, Cornell University, and Mr. Stoughton Cooley, Secretary of the Association. The proposed bill was designed for elections of aldermen in the large cities. It reads as follows:<sup>11</sup>

### BILL

To establish a System of Proportional Representation in Cities.

Sec. I. The members of the board of aldermen to be chosen at any election shall be chosen by all the voters of the city on a general ticket, and not by separate districts [or wards].

Sec. II. Any party or body of voters which polled at the last preceding city election one per centum of the total vote cast for the principal office filled at said election, or which shall present a nomination properly signed by voters equal in number to such percentage (or by the number specified in the law of the State concerned), may nominate a ticket or list of any number of candidates for said board of aldermen not to exceed the total number of persons to be elected on said board, and the names of the persons thus nominated shall be printed on the official ballot, but so that the list of candidates nominated by each party or body of voters shall be printed separately.

Sec. III. A candidate may be placed on several party

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<sup>11</sup> See Commons, p. 119.

tickets, but he may choose in favor of one of them. All of the votes cast for him are then counted for the ticket chosen. In default of a choice by him the ticket to which he shall be assigned is determined five days before election by lot, by the proper officer, in the presence of official representatives of the parties or petitioners concerned, if they wish to appear. A candidate's name cannot be placed on any ticket if he makes objection in writing to the proper officer five days before the election.

Sec. IV. Each voter shall have as many votes as there are persons to be elected, which he may distribute as he chooses among the candidates, giving not more than one vote to any one candidate, votes thus specifically given to be known as "individual votes," and each such vote shall count individually for the candidate receiving the same, and for the ticket to which the candidate belongs. In case a voter does not use the total number of votes to which he is entitled by specifying that number of candidates, the remainder of his votes to be known as "ticket votes" shall be counted for any ticket as a whole, provided that he designate such ticket by title, otherwise only the "individual votes" shall be counted. His entire ballot will be void if more than one ticket is indicated by title.

The voter casts his "individual vote" by marking in the space provided by law opposite the names of the separate candidates; he casts his "ticket vote" by marking in the space provided at the head of the ticket.

Sec. V. Judges and inspectors of election shall determine for each precinct, and the central canvassing board for the city the following:

1. The number of votes invalidated for any cause.
2. The number of valid "individual votes" cast for each candidate.
3. The number of valid "individual votes" cast for each party or ticket.
4. The number of "ticket votes" cast for each ticket.
5. The number of valid votes cast for each ticket, including "individual votes" and "ticket votes."
6. The total number of all valid votes cast.

Sec. VI. In determining the results of the election:

1. The total number of valid votes cast for all tickets shall be divided by the number of candidates to be elected; the quotient, ignoring fractions, to be known as the "unit of representation."

2. The total number of valid votes cast for each ticket shall be severally divided by the unit of representation, and each such ticket shall be entitled to a number of aldermen equal to the quotient thus obtained, ignoring fractions.

3. If the sum of such quotients be less than the number of persons to be elected, the ticket having the largest remainder after the division aforesaid shall be entitled to an additional alderman; thereafter the ticket having the second largest remainder, and so on, until the whole number is chosen.

Sec. VII. When the number of representatives to which each ticket is entitled shall have been so determined as provided in Sec. VI, the candidates upon such tickets who shall have received the highest number of votes (not exceeding the number of representatives to which such ticket is entitled) shall receive certificates of election. In case of a tie between tickets or candidates, the lot decides.

Sec. VIII. If a ticket obtains more representatives than it has presented candidates the number of seats remaining to be filled is distributed among the other tickets in proportion to the votes cast for each.

Sec. IX. When there is a vacancy in any seat, the candidate who has received in the general election the greatest number of votes after the one elected in the party or group within which the vacancy has occurred is chosen to fill it.

A partial test of a similar plan was given by the Belgian government November 19, 1893, using the Australian ballot. I quote from Mr. Commons a summary of the result:

The Belgian Parliament having on hand the revision of the constitution, determined to test the claims of the advocates of proportional representation by a trial elec-

tion of the eighteen representatives from Brussels in Parliament. \* \* \* The people of Brussels took a lively interest in the experiment. Meetings were held in various parts of the city, and the method of voting was explained. About 12,000 electors cast their ballots. The voting booths were open from 9 a. m. to 4 p. m. The counting of ballots was begun at once and completed in all the precincts in three-quarters of an hour to four hours' time, for from 300 to 1,940 ballots each. This work was found to be not at all complicated, and was done as easily and rapidly as in the ordinary elections. The work of the Central Bureau began at 5:30 p. m., and the returns from the several precincts were added up as rapidly as they came in. \* \* \* The party votes were the following:

Party—	Ticket ballots.		Ticket votes.		Mixed votes.		Total votes.
Moderates ....	546	$\times 18 =$	9,828	$+$	1,865	$=$	11,693
Progressists ....	2,013	$\times 18 =$	36,234	$+$	3,278	$=$	39,512
Socialists .....	5,748	$\times 18 =$	103,464	$+$	3,217	$=$	106,681
Flemish-Dem. ..	1,127	$\times 18 =$	20,286	$+$	1,427	$=$	21,713
Independents .....	411	$\times 18 =$	7,398	$+$	1,027	$=$	8,425
Catholics .....	972	$\times 18 =$	17,496	$+$	1,909	$=$	19,405
			10,817	$\times 18 =$	194,706	$+$	12,723 = 207,429

Applying the proposed American plan to the distribution of seats, the result would be as follows: The total number of votes, 207,429, divided by 18, gives 11,523 as the unit of representation. Dividing the party votes by this unit provides for fifteen representatives; the remaining three are assigned to the parties having the largest remainders.

Party—	Total vote.		Unit of rep.			Remainder.	Seats.
Moderates ... ..	11,693	$\div$	11,523	$=$	1	$+$	170 = 1
Progressists .. ..	39,512	$\div$	11,523	$=$	3	$+$	4,943 = 3
Socialists .....	106,681	$\div$	11,523	$=$	9	$+$	2,974 = 9
Flem. Democrats	21,713	$\div$	11,523	$=$	1	$+$	10,190 = 2
Independents ....	8,425	$\div$	11,523	$=$	0	$+$	8,425 = 1
Catholics .....	19,405	$\div$	11,523	$=$	1	$+$	7,882 = 2
					15		18



While such a system would, without doubt, be a marked improvement over the present systems, or the system proposed by Mr. Johnson, of Ohio, still it would not wholly eliminate the evils that might arise from the cumulative feature in the "party ticket." The retention of this feature would furnish an inducement for the party managers to nominate only such a number as they might hope to elect. Therefore there would be little of choice remaining within the party or without, and a nomination secured by manipulating the primaries would still amount to an election. The system under consideration might secure proportional representation in the deliberative branches of government, but it would not be adapted to securing men of ability and integrity to the public trust—men who were not primarily the tools of a ring or machine.

The first step in a popular election is the nomination of candidates. Here our work of reform and here the application of any successful device for securing good men must begin. To this end the following plans of nomination are suggested:

First, where a party convention is not necessary and a "primary" alone will suffice to make the necessary preparations for a final election, that the "limited ballot" be used in the nominating or primary election. Experience has shown that in a final election the "limited ballot" does not secure good results; while it gives minority representation it also gives the election, in each party, to the machine men.<sup>12</sup> That is if, as in Boston, in 1894, twelve aldermen were to be elected "at large," each voter being allowed to vote for seven candidates only, the machines of each of the leading parties would nominate only seven candidates, and then concentrate all their energies to elect these. The result would be

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<sup>12</sup> See page 301.

that there would remain little chance for anti-machine candidates being elected. But for the same reason that the "limited ballot" has been a failure in the final election, it would appear to be an excellent device for the purposes of a primary. When used in the final elections the strength of each party would be so directed and controlled that those places not filled by the machine men of one party would be filled by the machine men of the other party. When used by a single party for the purposes of nominating candidates, however those places not filled by the machine men would be filled by anti-machine or independent candidates, and if the voter were allowed to vote for only half as many candidates as there were places on the ticket to be filled then the machine men could not get more than one-half the places on the ticket. This would give the electors of the party an opportunity for choice between "good" and "bad" candidates in the final election. If, then, we require each party to pursue this method of nominations not more than half of the candidates on any ticket would be of the ring. Taking the ordinary case in which the strength of each of the two leading parties is about equal, if we give to each party its proportional strength, each would elect about one-half of the officers to be elected at the final election, and if by use of a "free ticket" under the Australian system, the anti-machine candidates of the parties received stronger support from the electorate than the machine men received, all of the offices would be filled by anti-machine or independent candidates. At the same time the party lines and issues would be retained as a means of expressing popular sentiment and instructing representatives on the questions of the day.

We will suppose, for example, that there are ten congressmen to be chosen "at large" from the State of Illinois, that in the primary election held by each party, each partisan elector was restricted to one vote from

each of five "candidates for nomination" by his party,<sup>13</sup> and that the ten having the highest number of votes at the primary be considered as the regular nominees. Then the machine, if there be one, could not nominate more than five of the ten candidates, while the other five would be filled by other opposition or anti-machine candidates. In case the primary election law required that only those candidates nominated according to its provisions might have their names placed on the official ballot, we would have in each party represented ten nominees for as many offices to be filled. Holding the final election under the Australian ballot system and giving to each elector the opportunity of voting for whomsoever he would, i. e., a "free ticket," those candidates of each party which had the largest popular support would stand at the head of the ticket in his party. If, then, we used the plan proposed by Mr. Johnson, or Mr. Commons, in making the count<sup>14</sup> we would secure the two ends so desirable in elections: (1) We would secure a representation in the deliberative bodies proportional to the strength of the party divisions; (2) we would have as representatives of those parties the men who had the greatest strength in their party, i. e., those who were in highest popular favor.

It is thought that proportional representation under such a system of popular nominations and direct election would accomplish the following results:

1. It would give to each constituency which is of sufficient strength for recognition a representation in the legislative or deliberative bodies of the government pro-

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<sup>13</sup> That is, supposing that each voter were allowed to vote for five candidates only.

<sup>14</sup> Proportional representation, as presented, means nothing more than so counting the votes that each party will have its *proportional* strength and that the leading candidates of *each party* shall represent the parties in that proportion.

portional to the strength of such constituency,<sup>15</sup> as a result of which the sentiment of the people would be represented in and impressed on the governing bodies.

2. It would prevent the exaggerated influence of successful parties in government as it exists at present under majority and machine rule.

3. It would destroy machine rule in nominations and elections, by preventing "gerrymandering," by making futile efforts to concentrate forces in critical districts, by minimizing the inducement to use money, fraud, deceit, misrepresentation and other subversive tactics as a means of obtaining votes.

4. It would give the greatest possible independence and equality to the voters.

5. It would give the greatest possible force to independent citizen movements.

6. It would place the most prominent men in the party in office—would bring the greatest statesmen to the front instead of the "party boss."

7. It would make the political party a true instrument of political expression, and party success a means of promoting the general welfare instead of a device for distributing spoils.

But nominations by primary election alone are not always practical. In nominations for State and national elections the constituencies are large. It is often desirable to frame issues and get a representative expression on leading men from different parts of the State or nation as candidates. For this purpose conventions are often found necessary. The convention system, however, in its present form is subject to many abuses. The plan of nominations here suggested where conventions are thought necessary is set forth in the appendix.

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<sup>15</sup> Each constituency which had the required number to be entitled to representation under the law.

## III.

As to the third condition which is adverse to the general welfare—that of the employment of the spoils system in appointments—enough has already been said in the preceding chapter and this. This evil is bound to go with the adoption of the “merit system” and the enactment of laws guaranteeing “equality” in election.

## IV.

The fourth adverse condition—that of the corruption of our legislatures—is most serious; one that has caused us much anxiety in the endeavor to perfect our plan of government. What are the causes to be assigned for this political disorder? What are the forces which are at work, and what the purpose of their activity?

The forms in which legislative corruption may be stated are as follows: The practices employed (1) in the election of United States senators; (2) in the “gerrymander;” (3) in special legislation; (4) in obtaining special grants of power and franchise for corporations; (5) in the disposition of public property; (6) in procuring appropriations; (7) in incurring indebtedness for public works and the letting of contracts therefor; (8) in laws for taxation. What are the means that may be employed to protect the State against these various forms of corruption? How can we adapt our system to the demands of the general welfare in such matters?

For the first—i. e., corruption of legislatures growing out of the election of United States senators—the direct election of these officers by the people of the State offers a remedy.

For the second—the “gerrymander”—the election of

the State legislature by a general ticket under a system of proportional representation would act as a specific.<sup>16</sup>

For the third form of legislative corruption—that of obtaining of special legislation in the interests of spoils—the adoption of such constitutional provisions as those found in the constitution of Montana would seem sufficient. This constitution, after specifically enumerating about thirty-six subjects in which special legislation is prohibited, added the saving clause: “In all other cases where a general law can be made applicable no special law shall be enacted.”<sup>17</sup> Since the adoption of the many provisions set forth in Chapter XIV, restricting special legislation, the States have suffered little on this account, but in the national legislature it has been one of the chief sources of abuse. A large part of the patronage is distributed, and the public treasury is being constantly invaded by this means. Such a provision as that referred to above is imperatively demanded in our federal system.

As to the fourth form of legislative corruption—that of obtaining special grants and privileges under charters

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<sup>16</sup> It is suggested that the nomination of candidates for State representatives might be made from districts, as at present, using the “limited ballot” at the primaries. This would insure sectional representation. But the nominations having come from the district the candidates should be voted on by the people of the entire State, thus insuring the election of the most reputable men nominated from the district and avoiding the district or ward methods. The legislature is a body of State officials, for purposes of expediency, made up of representatives drawn from different districts. Provisions having been made in the nominating system for the representation of the interests of the different districts, there is no reason why the people of the State should not have the right to determine which of the nominees proposed by the districts shall serve and bind them. The representative does not merely bind his district; he, by his acts, binds every citizen in the State; he exercises powers upon which there can be but comparatively few checks. The legislature is largely a law unto itself and the maker of laws for the State. Why should not the people of the State have the final choice of their legislative agents?

<sup>17</sup> See *supra*, p. 351.

of incorporation—some of the States have already evolved an effective means of security wherein the term of years for which a charter may be granted is limited, and the legislature has reserved the power to alter, amend or revoke the charter whenever the exercise of any corporation or corporate powers granted become detrimental to the interest of the commonwealth or its citizens. It only remains for like provisions to be adopted by all of the States in order to give the protection desired. Or if at any point these provisions should fail by reason of the character or quality of the legislatures, such a defect could be cured by making the general law authorizing charter grants the subject of referendum. This would be a very proper use of the referendal device, as a company on being incorporated is endowed with certain sovereign powers, and any law for the disposition of sovereign rights or public property should, on principle, be referred to the people for ratification.

The corporation could have little inducement to corrupt the legislature and maintain a lobby there, if the results of that corruption, the special privileges obtained, were liable to be altered or amended or revoked at the next session in case they were found adverse to public interest. It would gain nothing by maintaining a lobby, or even by securing the selection of favorable legislators, if the laws passed providing for corporate grants and franchises must be submitted to the people. Of what avail would the efforts of the street car magnates at Springfield during the last session have been if such provisions as those set forth above had been in the constitution of Illinois? The money spent for the passage of the Humphrey and Allen bills would have been to little purpose, and in any event the corporate privileges could not have been extended over more than twenty years.

The first provision above set forth, however, may at

times be thought objectionable because of the uncertainty which it gives to investment. While it might never be used in a manner detrimental to the interests of the investor, the fact that there is a possibility of its being so used has stood forth as an obstacle to its employment. This objection has been completely overcome and at the same time the public interests secured by a device which has been successfully used in some of the European countries in the case of railroads, telegraphs and other quasi-public corporations. This device is such that the road-beds, the tracks, the rights of way, and all of the fixed improvements of such corporations shall, at the expiration of the term of incorporation, belong to the State, and thereafter these properties may be leased or operated by the State in such manner as may be deemed to be to its best interests. This provision makes the private corporation the direct agent of the public welfare, and has been one of the most wholesome developments of the century.<sup>18</sup>

For the fifth form of legislative corruption—that of the disposition of public property—experience has demonstrated that sufficient protection is found in constitutional provisions requiring such matters to be submitted to a vote of the people.<sup>19</sup> Such provisions should become general in our constitutions.

The sixth—that of procuring appropriations—has found correctives in various forms.<sup>20</sup> The principal source of this evil, at present, is in “log-rolling.” Each member of the legislature has some particular object, personal or local, for which he seeks government aid.

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<sup>18</sup> The device used in England is one giving to the public the right to purchase the plant of the company at the then present value of material, exclusive of profits, franchise, etc., at the expiration of twenty-one years after the first charter grant and at the expiration of each seven years thereafter. See Appendix II.

<sup>19</sup> See *supra*, p. 222.

<sup>20</sup> See *supra*, p. 321.



In order to get his particular appropriation passed, it is necessary to pledge his support to the appropriations asked for by a sufficient number of other members to make a majority vote. This practice of mutually pledging support as a means of obtaining personal or local ends is called log-rolling. The river and harbor appropriations of the national government afford a most excellent example of its vicious results. By this form of appropriation plunder is distributed to each congressman or group of congressmen as a means of patronage, and very often without even the semblance of need for such improvements. The best specific remedy that we have so far discovered for the evil is that employed by many States whereby the executive is authorized to veto such items of an appropriation bill as the public interests demand, and to allow the other items to stand and become a law. The constitution of Wyoming, for example, has the following provision:<sup>21</sup>

“The governor shall have power to disapprove of any item or items or part or parts of any bill making appropriations of money or property embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items and part or parts disapproved shall be void unless enacted in the following manner: If the legislature be in session he shall transmit to the house in which the bill originated a copy of the item or items or part or parts thereof disapproved, together with his objections thereto, and the items or parts objected to shall be separately reconsidered, and each item or part shall then take the same course as is prescribed for the passage of bills over the executive veto.”

If President Cleveland had had such a power, in 1896, Congress would not have foisted on the country the river and harbor bill vetoed by him. By the constitution of

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<sup>21</sup> Constitution 1889, Ch. IV, Sec. 9.

the United States the President must veto or approve each act as a whole. The nature of the bill vetoed by the President, June, 1896, cannot be better set forth than by the following extract from the message accompanying its return:

There are 417 items of appropriation contained in this bill, and every part of the country is represented in the distribution of its favors. It directly appropriates or provides for the immediate expenditure of nearly \$14,000,000 for river and harbor work. This sum is in addition to appropriations contained in another bill for similar purposes amounting to a little more than \$3,000,000, which has been already favorably considered at the present session of Congress. The result is that the contemplated immediate expenditures for the objects mentioned amount to about \$17,000,000. A more startling feature of this bill is its authorization of contracts for river and harbor work amounting to more than \$62,000,000. \* \* \* If, therefore, this bill becomes a law, the obligations which will be imposed on the government, together with the appropriations made for immediate expenditure on account of rivers and harbors, will amount to about \$80,000,000. Nor is this all. The bill directs numerous surveys and examinations which contemplate new work and further contracts, and which portend largely increased expenditures and obligations. \* \* \* Many of the objects for which it appropriates public money are not related to the public welfare, and many of them are palpably for the benefit of limited localities or in aid of individual interests. \* \* \* I learn from official sources that there are appropriations contained in the bill to pay for work which private parties have actually agreed with the government to do, in consideration of their occupancy of public property. \* \* \* The public treasury will be confronted with other appropriations, made at the present session of Congress, amounting to more than \$500,000,000. \* \* \* I hope I may be permitted to suggest at a time when the issues of government bonds to maintain the credit and financial standing of the country is a subject of criticism, that the contracts provided for in this bill would

create obligations of the United States amounting to \$62,000,000 no less binding than its bonds for that sum.

Suppose that the constitution of the United States had contained such a provision as that above set forth from the constitution of Wyoming; suppose that the President had vetoed all such items as seemed to him local, personal, or in payment for obligations of private parties due to the government for use of public properties, and suppose again that each of these vetoed items had, under the provision, come up as a separate bill, the President could have so aroused the public by his various veto messages in case Congress had dared to pass them separately, that to have voted for one of them would have resulted in political suicide. By making each of the vetoed items individual bills the selfish interest involved in a "log-rolling" scheme is eliminated, and the "itemized" veto becomes a most useful power in the hands of the executive to check this form of corruption. And there will be every inducement on the part of the executive to use it, for he would then be held responsible personally for each item of an appropriation bill. Joint resolutions providing for amendments to the constitution of the United States so as to give the President this power were introduced into the house by Messrs. Stanforth, of Colorado,<sup>22</sup> and Maxwell, of Nebraska,<sup>23</sup> after the passage of this bill over the head of President Cleveland, but the house simply buried them both in the judiciary committee, and they have not been heard of since. Other effective means have been employed by the States,<sup>24</sup> but the adoption of the one above proposed would do much to eradicate the evil and complete the adaptation of that part of our system to conditions of general welfare.

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<sup>22</sup> April 7, 1897, H. R., 48.

<sup>24</sup> See *supra*, pp. 321-4.

<sup>23</sup> July 12, 1897, H. R., 74.

For the seventh form of legislative corruption—that associated with the incurring of indebtedness for public works—the referendum has proven an adequate remedy. The public work proposed, which entails the incurring of a public debt, should be submitted to a popular vote for an expression as to whether it will be undertaken and at what cost. If a State improvement then the matter would be submitted to the State; if a county affair then to the people of the county, etc. The extension and perfection of the merit system in the civil service is also essential to all public works. They require technical knowledge and an identification of the business of the civil servant with the business of the public. This cannot be obtained through the shifting spoils system.

The eighth subject of corruption—as found in the passage of laws for taxation—presents greater difficulties than any of the others, for the reason that we have not yet worked out, in fact the world at large has not yet worked out, a system of taxation that is satisfactory. All of the systems in vogue are in a measure inequitable. The remarkable economic development of the last century, the change in the forms of wealth and taxable property during the last fifty years, the broader co-operative organization by which the economic foundation often goes beyond the limits of the tax jurisdiction (the State) many times including several such jurisdictions, makes the difficulty of applying the principle of democratic justice, or taxation in proportion to ability to pay, very great.

One of the chief obstacles to the successful application of principles of justice and equality in taxation, the condition which renders the problem most difficult, is the manifest disposition on the part of the wealthy classes, those who so largely possess these new forms of wealth, to evade their just burdens, and to thwart every attempt at a fair adjustment. Ex-President Harrison, in a recent

address before the Union League Club of Chicago,<sup>25</sup> most forcibly portrayed this condition. His language was in part as follows:

For very many years an opinion has been prevalent that the great bulk of personal property of the States, especially of the class denominated "securities," including stocks, bonds, notes, mortgages and such like, has escaped taxation. With very few exceptions the great fortunes of this country are invested in such securities. Recent investigations by students of political science, and recent tables prepared by State tax officials, have disclosed an appalling condition of things. The evil seems to have been progressive, until in some of our great centers of population and wealth those forms of property seem to have been almost eliminated from the tax list. Comptroller Roberts of the State of New York states that from \$2,500,000,000 to \$3,000,000,000 of personal property taxable by law in New York escapes taxation every year.

In 1874 the board of State assessors of New York reported to the legislature, "From our examinations we are satisfied that less than 15 per cent of the personal property of the State liable to taxation finds a place on the rolls of the assessor. The amount of personal property assessed in some of the counties is less than the banking capital, and the same is true of thirty towns and cities, among which are some of the most prosperous in the State." In 1892 the board reported: "Laws for the assessment of personal property have failed to do their work, and the failure becomes more complete and more unjust with every successive year."

The report of the revenue commission of Illinois for 1886 discloses that practically the same state of things exists in your State. Indeed so glaring and outrageous is this withholding of personal property from the tax list,

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<sup>25</sup> The Union League Club is one of the most wealthy organizations in the city of Chicago. The address from which we quote was delivered on the anniversary of Washington's birthday, 1898, as an admonition to men of wealth as to their duties to the government and to themselves by virtue of their dependence on the security of government in the enjoyment of their property.

and the inequalities between the counties of your State resulting from this practice, that I notice the labor commission of Illinois recommends the abandonment of the attempt to collect taxes upon personal property. The statements which are attributed by the bureau of labor to eminent citizens of Chicago as to tax conditions are appalling.

Prof. Bemis, in a recent letter in the Independent, speaking of affairs here in Illinois, and of some revelation made by your Taxpayers' Defense League, drew a comparison between the commercial agency ratings and the tax list, and gave this instance: "A certain banker, rated by Bradstreets" among the millionaires, is assessed at \$1,200, or less than 1 per cent of his personal property, while a poor woman, Mrs. McGuire, is assessed on her real estate at 23 per cent of its value. The question naturally arises, "How long will there be any respect for government or law, if these things are allowed to continue?" In conclusion he says: "A great awakening all over the country is needed, and that speedily, in order that the people may appreciate the enormity and injustice of existing methods of State and local taxation, and may be impelled to effect changes that shall make of the State an instrument of righteousness rather than what it is now in this matter of taxation—a conniver at fraud and creator of inequality."

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Taxes are a debt of the highest obligation, and no casuist can draw a sound moral distinction between the man who hides his property or makes a false return in order to escape the payment of his debt to the State, and the man who conceals his property from his private creditors. Nor should it be more difficult to follow the defaulter in the one case than in the other. If our taxes are farmed out to an individual or to a corporation they would be collected. There would be a vigilant and unrelenting pursuit. The civil and criminal processes of the law would be invoked with effect, just as they were against fraudulent debtors under the bankrupt law. Is it not possible to secure public officers who will show the same activity?

When to this enormous and crying evil is added the corruption which it is alleged characterizes the appraise-

ment of real estate in some of our great cities, we have a condition of things with which we dare not falter. We must inaugurate, and at once, a system that shall equalize tax burdens. The men of wealth in our great communities should lead the movement. This great club, organized as a rallying center for loyalty and patriotic citizenship, should hear a call as loud and imperative as that which came to its members during the years of the civil war.

Mr. Lincoln's startling declaration that the country could not continue to exist half slave and half free, may be paraphrased to-day by saying that the country cannot continue to exist half taxed and half free. This inequality breeds a fierce and unreasoning anger, creates classes, intensifies social conditions, and tends to make men willing to pay their debts in 50 cent dollars.

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The spirit of discontent is rife. The farmer, the man of moderate circumstances, has unfailingly and unfalteringly rallied to suppress mob violence and to preserve the peace of our communities. These men are not agrarians or socialists or anarchists or covetous of other men's goods, but they will not, and ought not, permit the tax burdens upon their smaller properties to be doubled by the evasions and frauds of the holders of these intangible securities.

As shown by Mr. Harrison:

The great bulk of our people are lovers of justice. They do not believe that poverty is a virtue or property a crime. They believe in equality of opportunity, not of dollars. \* \* \* Equality is the golden thread that runs through the fabric of our civil institutions, the dominant note in the swelling symphony of liberty. And as a corollary, necessary and imperative, to this doctrine of an equality of right is the doctrine of a proportionate and ratable contribution to the cost of administering the government. It is a part of our individual covenant as citizens of the State that we will, honestly and fully, in the rate or proportion fixed from time to time by law, contribute our just share to all public expenses. A full conscientious discharge of that duty by the citizen is

one of the tests of good citizenship. To evade that duty is a moral delinquency, an unpatriotic act.

When we consider that the forms of property held by the wealthy classes are, more than any other, dependent for their value on the maintenance of the established order of society, that any general disturbance or popular uprising which threatens this foundation, often causes these securities to become worthless; when we further consider that the peaceable use and possession of all property must of necessity depend on government, and that all forms of credit are so largely dependent on strict integrity, it seems most foolish for these classes to avoid the expense necessary to maintaining order, and to be the ones to teach the lesson of infidelity. When we consider that they are the ones who have been most liberally endowed with the benefits which flow from good government and with the means of satisfaction, it is a short-sighted policy for them to refuse to contribute to the government in proportion to these blessings, and the means which they enjoy by virtue of its maintenance. It has been suggested that unless, by peaceable means, there is an equitable adjustment of taxation according to ability to pay, there will be a revolution. However true this may be, the wealthy classes are not strengthening their own position by tax evasions. They owe a duty to society which cannot be neglected. If they would take as active a part in the solution of the problem of taxation according to ability to pay as they have in thwarting every effort to this end, the problem would not be difficult.

## V.

The fifth condition which confronts us, which stands as a menace to our institutions—the subversion of municipal government in the interest of organized spoliation, is the last which we have to consider. Under our pres-



ent system nearly every department of municipal government is perverted to this end.<sup>26</sup> The regular nominating, electoral and appointive devices are utilized as a means of controlling the exercise of the functions of government and for obtaining official salaries. The administrative, judicial and legislative departments are manipulated for "spoils."

The first strategic point in a campaign for "spoils" is that of control over nominations. By the present nominating devices the faction which is successful in this is the one that controls the party. The force against which the people must protect itself in nominations as well as elections is the "machine." How can the electors of a party avoid being controlled by organized place hunters? So far their only means is to form, and officer, a counter organization which can assert itself with greater force. Occasionally this is done, but no sooner does the party fall under the control of the new organi-

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<sup>26</sup> Andrew D. White, in an article entitled "The Government of American Cities"—The Forum, December, 1890—represented the condition as follows:

"Without the slightest exaggeration we may assert that, with very few exceptions, the city governments of the United States are the worst in Christendom, the most expensive, the most inefficient, and the most corrupt. No one who has any considerable knowledge of our own country and of other countries can deny this. \* \* \*

"The city halls of these larger towns (i. e., New York, Philadelphia, etc.) are the acknowledged centers of the vilest corruption. They are absolutely demoralizing, not merely to those who are under their sway, but to the country at large. Such cities, like the decaying spots in ripe fruit, tend to corrupt the whole body politic. As a rule the men who sit in the councils of our large cities, dispensing comfort or discomfort, justice or injustice, beauty or deformity, health or disease, to this and to future generations, are men who in no other countries would think of aspiring to such positions. Some of them, indeed, would think themselves lucky in keeping outside of prisons. Officials entrusted with the expenditure of the vast wealth of our citizens are frequently men whom no one would think of entrusting with the management of his private affairs, or, indeed, of employing in any capacity. Few have gained their positions by fitness or by public service; many have gained them by scoundrelism, some by crime."

zation than its leaders themselves, seeking to perpetuate their own control, become a menace to good government.<sup>27</sup> We must adopt a device for nominations that will take the control over the electorate out of the hands of such organizations and place party nominations on a free choice of the electors of the party, regardless of a political machine. For the accomplishment of this end, in the election of municipal officers, the devices set forth above pp. 408 to 411 and below pp. 511 to 514 are submitted.

Take for example the city of Chicago. Let each of the thirty-four wards choose four delegates to a city convention by means of a "limited ballot," giving each elector of a precinct the privileges of voting for two candidates only. Then let the four candidates having the highest number of votes for delegate be the representatives of the ward in the city convention. When the convention shall have met let them proceed to ballot on the leading men of the party for candidates for mayor until one of them shall have received a majority vote, then let this one and the one having the next highest vote on the same ballot be declared to be the candidate of the party for nomination for mayor. A double list of candidates for each office having been selected in this manner, then let this double list of candidates be submitted to all of the electors of the party in the city at large.<sup>28</sup> By providing that the names of only such as

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<sup>27</sup> A very conspicuous example of this is found in Tammany Hall, an organization which was at first organized for laudable purposes, and which took a stand for good government in opposition to the arbitrary measures of the opposition. On attaining power, as a means of perpetuating the control of its leaders, it became a most dangerous political machine, operated in the interest of spoils.

<sup>28</sup> The double list should be submitted to all of the electors of the party in the city at large, as each officer, though he may be chosen from and represent a ward, is an officer for the whole city and binds the municipality by his acts. By this method, while each ward will take the initiative in presenting the names

might be nominated in this manner<sup>29</sup> shall be placed on the official ticket, each of the parties would be compelled to employ the method prescribed.

The nominations having been made as above set forth, the names of the various candidates might be placed on one ticket, each party having the names of its candidates printed in separate columns, and the Australian system of voting employed. The law might also require that the candidates for aldermen from the various wards should be balloted on by the party electorate of the whole city, so that the whole electorate of the party would participate both in the nomination and election of ward representatives. By this or some similar plan the people could effectively protect themselves from the use of the machinery of nominations and elections as a means of subverting their municipal government; and not only protect themselves, but also have a device whereby those best fitted to serve might be put into public service.

Relative to the appointing power, we have already found a solution in the merit system, in so far as it has been applied.

In the judicial department, the police and justice courts are the only ones against which serious complaint is lodged. In order to overcome the vicious character of these courts, their election might be by the same method as that proposed for aldermen. To nominate, let the party electors of each judicial or administrative district entitled to a police or justice court vote for twice as many candidates as there are places to be filled, using the "limited ballot." For example, we will suppose that the South Town of Chicago is entitled to two justices and two constables. At the same primary election at

of candidates to represent it in the council, the nomination will be made from the names presented by a majority of the party electors of the whole city.

<sup>29</sup> Such a requirement is the only effective way of enforcing primary election laws upon parties.

which delegates are chosen to a city convention let the electors of the South Town select four candidates for justice and four candidates for constable, each elector having the right to vote for two candidates for each, the four having the highest number of votes being the candidates for party nomination. Then at the time when the double list of party candidates is submitted to the party electorate of the city let the electors of the party, by a majority vote, determine which two candidates for justice and which two for constable shall be the party nominees.<sup>30</sup> This would take the justices and constables out of ward politics, take them out of the hands of the machine, and make them responsible to the people.

As to the local officers of the South Town, such as assessor, collector, town attorney, etc., these might be nominated by the same system and at the same time, except that the double list would be submitted to the electors of the South Town only, and in the final election the nominees would be balloted on by the town as at present.

The legislative department of municipal government, by its structure, should provide for two elements of representation. It should be a body with an eye to the welfare of the city at large; it should also be representative of the various wards or sections of the city. In order to secure these ends many of the large cities have adopted a plan where a part of the councilmen are from the city at large and a part from the wards. Applying this plan to the city of Chicago, which at present has a unicameral council of 68 members, two from each ward, we might have 34 members—one from each ward—chosen from the wards, and 34 chosen from the city at large by the method proposed above. If such a system were in vogue such men as the recently elected aldermen from the First

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<sup>30</sup> The justices and constables should be nominated and elected by the electors of the entire city for the reason that they are in a large measure servants of the entire city.

and Nineteenth wards could scarcely survive; or if, by some miscarriage they managed to get elected to a seat in the council they could have little weight in the deliberative body. A man who had made a good record would stand on such a high level before the people of the city that the municipal elections in the United States, as in England, would resolve themselves into contests over seats only where the people were dissatisfied.<sup>31</sup>

The council body itself having been elevated above the level of ward politics, the next problem is that of preventing the exercise of its powers for corrupt ends. The causes for the corruption of municipal councils are apparent. The drift of modern society has been toward the large city. Modern invention, specialization, the division of labor in the interest of economy, the massing of capital in the hands of the entrepreneur class, the development of institutions, all tend toward the same end. With these new adaptations, the "uses" subject to public control, such as highways, streets, canals, etc., have become constantly more valuable for economic ends. It has been found of increasing economic advantage for society to have water, light, transportation, the means of rapid communication, etc., supplied by specialized agents, and to give to these specialized agents, as a necessary condition of success, the use of public ways and properties subject to public control. The specialized agents most available and which, under conditions present, could operate to the highest economic advantage of society have been private or quasi-public corporations.<sup>32</sup>

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<sup>31</sup> In England it usually happens that if the people are well satisfied with an alderman no other nomination will be made—that no one thinks of contesting a seat unless he can find some issue upon which to base opposition to the incumbent.

<sup>32</sup> The private or quasi-public corporation in the past has been able to render these services with greater economy to society by reason of the fact that, although their prime object has been private gain, and the incorporators have derived immense revenues from the public, yet they have been organized on such a

This accounts for the fact that most of our municipal corruptions have had associated with their growth the modern private corporation. While the private corporations have rendered a very great service to society by conforming to conditions necessary for broad co-operation and great economy of effort and resources, yet, by reason of the greater economic advantages which they have offered to society and the increased public patronage by them received as a consequence, the opportunities for profit to the incorporators have proportionally increased. As the opportunities for profit have increased the privilege of using the streets and public ways, as a condition necessary thereto, has become more valuable; and this has been especially accentuated where the grants obtained were in the nature of monopolies.

The power to grant such privileges, as well as to fix the terms of the grant, being in the hands of the city council, under our present system, the "use" of every street in the city becomes an inducement held out by the public to corrupt the council as a means of securing favorable grants. To illustrate, we will take another example from the city of Chicago. In 1885 there resided in this city a young man, a stock broker, whose chief stock in trade was his unbounded energy. Seeing the value of an improved and more extended system of street railways, he secured an option on one more than one-half of the shares of each of two of the leading companies—the North Chicago City Railway Company and the old Chicago West Division Railway Company. Having secured an option for the purchase of a controlling interest

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basis as to provide for broad co-operation and the greatest economy of effort, while the public agencies have been on such a basis as to make broad and economic co-operation impossible. Such matters require high specialization and minute division of labor. The private concern made provision for this, while the public agency not only failed to make such provision, but, being controlled by a spoils organization, used every means of preventing it.

in these companies at a stipulated price,<sup>33</sup> he then procured from the city council some very favorable franchises for improvement and extension. With these options and franchises he then bonded his rights for enough to pay all obligations under the option, make all necessary improvements and extensions, and to make himself a millionaire.

Ten years afterward, through having obtained new franchises for companies which were incorporated for the purpose of holding and using them, and then borrowing money on the grants made by the city, his companies were in control of about 295 miles of electric, 48 miles of cable and 23 miles of horse car lines, which, according to their own financial statements, were capitalized at nearly \$60,000,000. In order that we may understand something of the economic advantage of these projects to their promoter let us consider their cost:

Mr. E. J. Lawless, in his report made to the American Street Railway Association,<sup>34</sup> places the cost of construction of cable road at \$50,000 per mile. Mr. Robinson<sup>35</sup> estimates the cost of cable construction in Los Angeles, including 4,250 feet of viaduct and 2,124 feet of bridges, at \$52,000 per mile; and in the report of the Illinois Labor commission the maximum cost of cable road of the three leading companies in Chicago is placed at \$50,000 per mile. This seems to be a fair and liberal estimate for cable road construction in Chicago. From similar reports and the estimates of experts we find that

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<sup>33</sup> The price which Mr. Yerkes stipulated to pay for these shares in case he secured the franchises and the loan desired was \$600 per share of \$100 on the North Side line, and \$650 per share of \$100 on the West Side line. But, having no money of his own with which to make the purchase, he was willing to stipulate a large sum, provided it could be borrowed on the property of others.

<sup>34</sup> Proceedings of the Am. St. Ry. Assn. (1886), p. 63.

<sup>35</sup> Proceedings of the Am. St. Ry. Assn. (1891), p. 87. See also report of 1889.

the cost of electric and horse car road construction is from \$14,000 to \$16,000 per mile. A liberal estimate of cost of equipment of these lines, including power houses, cables, wiring, machinery, cars, etc., would not exceed \$15,000,000. A statement of cost, therefore, on this basis, would be as follows:

295 miles electric, at \$15,000 per mile.....	\$ 4,425,000
48 miles cable, at \$50,000 per mile.....	2,400,000
23 miles horse, at \$15,000 per mile.....	345,000
Cost of Equipment.....	15,000,000
	<hr/>
	\$22,170,000

But referring to the statements made by these companies we find that they have borrowed \$26,562,000 on the properties, besides which the promoter and his friends are the owners of over \$30,000,000 of capital stocks which cost them not a dollar. A very remarkable case of this kind occurs in the Cicero and Proviso Street Railway. This is an electric road of seven miles; its cost for construction and equipment did not exceed \$300,000. Having procured a franchise from the city council, the company first borrowed \$600,000, giving first mortgage bonds therefor, and later, after the lines had been built in 1895, it made a second issue of \$1,289,000 of 5 per cent bonds on the road, for which it is asserted that it received between 80 and 90 cents on the dollar. We do not assert that the promoter of this scheme used a lobby or employed corrupt methods in obtaining this franchise, but when we consider that he might have expended \$1,000,000, if necessary, in securing a favorable franchise from the city council and still have had a very liberal reward for his effort, when we consider the many millions that the various street railway magnates of Chicago could afford to pay to obtain franchises over the streets for transportation purposes or, having procured, that they might afford to pay to retain them, when we understand further that the franchises



for gas, telephone, telegraph, heat, power, water, pneumatic transportation service, etc., are all attractive fields for capital if controlled by such grants as the city council has power to give, we may then have some notion of the economic inducements for corruption which surround our city government under the present regime. We may also understand why it is that men elected to office on reform tickets so often are false to the trust in them imposed by the electorate.

Nor can we expect to have a clean government so long as the people, through the present form of political organization, continue to offer such inducements to their officers to be corrupt. It would be quite as rational for the cashier of the Chemical National Bank of New York to leave its funds unguarded and within easy reach of every passer-by and expect that no one would steal them; for the manager of a large department store to give the clerks full powers to dispose of goods without accountability and expect no irregularity or misappropriation. Under the present system of municipal control we may have a perfect system of selecting honest officers and reform councils; yet with such a menace to honorable conduct we cannot expect them to serve the public well. Every valuable use of every street in our cities is a corruption fund held out to the public as a means of corrupting the government. Suppose that a certain franchise is worth \$10,000,000 and that this may be had from the city council. Every member of the council may be a man in whom we have the utmost confidence. Yet any designing individual who is willing to undertake it may make an arrangement with a bond syndicate to borrow the money on this franchise when it shall have been granted, use his promises with the members to secure the franchise, pay \$9,000,000, if necessary to corrupt the city council, and still be a million dollars better off as a reward for his corrupting engagement.

There is not sufficient manhood in any nation to withstand such inducements to spoliation.

Our problem here, as in other cases, is that of taking away the inducements which we now offer for corruption. How can this be done? We have already solved the problem in private concerns, where the principle of principal and agent is involved. We have solved it in many public affairs. Suppose some designing individual might wish to buy the Illinois and Michigan canal. How would he go about it? Under our present constitution he could not make an arrangement with the legislature for its purchase. He could only apply to them, as agents, to have them submit a proposition to the people, their principal. The people would then by formal expression, say whether or not the proposition was satisfactory; they would confirm and ratify or reject the proposition made. Suppose that such a device had been in force in Philadelphia. The city would not have been at the mercy of the gang of thieves who recently, in and out of the council, conspired to deprive the city of her gas plant. If all franchises for the use of public properties and public ways were made referendal measures, or, perhaps still better, put under such general laws as those in force in Great Britain, the present inducement to corruption of city councils would be largely wanting.

In order that we may protect the public welfare, it is proposed that we employ a plan for the disposition of franchises over public ways which combines both the features of the "English Tramways Act" and the recent Wisconsin law.<sup>36</sup> By the English act the term of franchise was limited to twenty-one years. This gives one year for original construction and twenty years of actual use. At the expiration of this time the municipality has the option of purchasing the plant at its present value,

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<sup>36</sup> See Appendix II.

exclusive of profits or prospective profits, value of franchise, damages for compulsory sale, etc.—i. e., in the words of Mr. Sidney Webb of the London County Council, “at scrap iron prices.” The Wisconsin law of 1897 provides that, in case the people of a city so determine by majority vote, all propositions for the granting of a franchise, together with specifications, shall be advertised and let to the highest bidder. Two other plans have been suggested, one that each franchise shall be made the subject of referendal election, the other that, at the time of the expiration of the charter, the corporate properties shall revert to the city. In the latter case the city owning the property may operate or lease it as circumstances may dictate.

By providing a system of nominations and elections such as to take the choice of officers out of the hands of the political machines, by the adoption of the merit system of appointments, and by removing from our city councils the present enormous inducements to corruption the people of the United States may reasonably hope for success in the government of their municipalities.

## CHAPTER XVI.

## PROBLEMS ARISING OUT OF THE RECENT WAR.

The recent war with Spain has brought success to our arms. But success brings with it problems quite as serious as the condition of war itself. These problems are of two classes: First, those which are general, i. e., those inevitable to a condition of war; second, those arising from this particular conflict. We will consider them in the order stated.

War is an extraordinary political condition. In modern society it involves a new and peculiar adjustment—a new organization, a new direction given to the activities of the political society engaged. In a democratic state where political action is the result of popular activity, where before any new adjustment is made popular thought must first be recast and directed along new lines, such a change requires some extraordinary stimulus. But the stimulus being present, the popular mind having become so affected as to produce the extraordinary activities and the new adjustment of affairs necessary for international combat, the safeguards of society set up for its orderly and equitable civil conduct are often neglected; in fact, the people are apt to be so thoroughly involved in the new war spirit and war organization as to make them an easy prey to those who are placed in political and military control under the new order of things. Warfare demands a very large increase in expenditure; it demands a more widely organized public service, both civil and military. Popular thought having been given a new direction and having been recast in support of in-

creased expenditures and increased public service for war purposes, especially when accompanied with success of arms, it gives great facility to the building up of a political organization which may lead to excesses after the return of peace, more to be feared and often more disastrous to the nation than the engagement of war itself. The evidences of this fact are all too well known. We have but to look to the experience of other nations which, maddened by success over foreign foes, have finally fallen victims to their own war organization; we have but to refer to our own experience after the wars of 1776, 1812, 1846 and 1861. In each of these cases the political activities became so seriously affected, the popular mind so intoxicated by the war, that the people, out of patriotic devotion and servility to the party which carried them through the struggle, have supported those who had gained control of the party organization without question or doubt; at last, calmed by the effrontery and excesses, the corruption and spoliation of those in power, they have been stirred to reassert their strength in opposition and to re-establish the political organization on a peace footing.<sup>1</sup> The corruption which was practiced, the spoliation which the people suffered during the preceding periods of unchecked party excesses, might occupy volumes in detail. In each case the patriotic impulses of the people were made use of for personal ends; popular devotion to military leaders was used as a tie by which popular support was secured for party control. It is under such circumstances that

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<sup>1</sup> These popular risings above the prevailing party organization which became established during the periods of national strain have been as follows: In 1800, with Thomas Jefferson as leader; in 1828, when Andrew Jackson took advantage of conditions present, and, placing himself in front of the popular movement, was carried into power; in 1860, when Abraham Lincoln became the apostle of the people to lead them away from the altars of their former political masters; and in 1876, with Samuel Tilden, and later with Grover Cleveland as the patron of reform.

demagoguery has its fullest power and the most artful in deceit rise to control. In the past it has taken years for the people to realize that both the organization and the kind of services needed for civil service is quite different from that necessary for military success; that the party organization strengthened by the successes of war and the enlarged political patronage involved in its prosecution is the most dangerous political condition which they have to face in times of peace. In the past the readaptation of the political organization to conditions best suited to the general welfare of the nation on a peace footing has occupied many years; thus far it has not been accomplished till more of the resources of the nation have been wasted in spoliation than were expended in the prosecution of the war.<sup>2</sup> These facts should stand before us as a

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<sup>2</sup> Recurring to the experience of the last war, we find that during the six years, from 1861 to 1866 inclusive, the average expenditures of the civil establishment was only \$30,000,000 per year, and that this included all of the extra civil service growing out of the exigencies of war, the expenditures gradually rising from \$23,300,000 in 1861 to \$40,600,000 in 1866. After the disbanding of the army and after doing away with the necessity for a large part of the civil establishment expenditures for this purpose, instead of decreasing, increased. For the next six years the average was about \$60,000,000, or double what it had been during the war. During the next four years—Grant's last administration—it averaged nearly \$76,000,000 per annum. The excesses were so gross that the people rose up against the party and cast a large majority for Tilden, Democratic candidate for President. Though by the jugglery of our electoral system Hayes was seated on the President's chair, the influence of the campaign for reform, as appears in the expenditures for the civil establishment during the next four years, was very marked. The annual expenditure for the civil establishment during Hayes's administration averaged only about \$57,000,000; and under Garfield and Arthur it rose only to about \$65,000,000 per annum. The spoliation, however, appears not alone in the expenditures of the civil establishment; the army, the navy, all of the departments, came in for their share. Even the pensions, that institution of National benefaction to her soldiers, established as a recognition of heroic sacrifice in the public service, were most wantonly prostituted, not only by direct fraud in dispensing patronage under general acts, but also by a long list of special acts of Congress when the general law could not be invoked. It has been estimated that fully 20 per cent of the money dispensed through this channel was purely for partisan ends.

warning. It is for the people of the United States in their sovereign capacity to determine how long shall be required for this adjustment in the present case; it is for them to demonstrate whether they will be misled by men seeking personal ends through appeals to their patriotic impulses. At such a time as this, when every demonstration of joy and welcome to returning heroes is used to excite support for parties and private enterprises, when the ambitious are planning to make these demonstrations mere pageants by which they shall be brought before the popular eye and by which the organization, built up for war purposes, may be maintained as a means to their own advancement, it is incumbent upon every citizen to not only renew his vigilance but to increase his efforts in giving a new direction to the current of popular thought—in utilizing this unity of spirit and unusual energy for the accomplishment of ends which will promote the well-being of the state.

In the present case, conditions are most propitious for a quicker and a more economical adjustment than has been heretofore effected. In the first place, there is no question of constitutional or of National policy involved in this struggle which had before the war led to a division of parties upon the issues of the conflict. Each of the parties was equally active and each equally responsible for the movement. The republican party, to be sure, was in control at the time, and some politicians no doubt will seek to make political capital out of this fact for private and party ends; but to sensible and thinking men such an assumption will be stamped with discredit and those advancing such claims will be branded with suspicion.

The second favorable circumstance is that a very large part of the army and navy was made up of volunteers—men whose lives have been given to peaceful occupation and the consideration of citizen duties under peaceful

establishments. Many of the war leaders too, like Col. Roosevelt of New York, have been most active in administrative reform; these men will again return to their former citizen relations and, with the added prestige of valorous military service, will devote their energies to their country in civil capacity. In so far as hero worship becomes a motive to political activity the people will therefore naturally turn to men who may be trusted in civil capacity.

In the third place, the spirit of animosity and sectional jealousy which has to greater or less extent prevailed in the past, has been largely overcome by the united effort made in preparation for and prosecution of the present war. We will not now have the intelligence of the North pitted against the intelligence of the South; we will not now have the patriotic men south of Mason and Dixon's line debarred from places of public trust on account of an ante-bellum political faith; but those highly cultured and public-spirited citizens who have done so much to sustain the high moral tone of American institutions will hereafter take a leading part in the public councils, official and unofficial. To the citizen strength of the North will be added the citizen strength of the South; the citizenship of the entire nation will be linked together in bonds of patriotic devotion to a common country and a common cause—that cause the general welfare of society and the building up of institutions here that will accomplish this end.

The problems peculiar to the present war are involved in the acquisition of territory. While our whole history has been one of colonization and of territorial acquisition, while our National polity from the beginning has been on an imperial plan, while our institutional growth has been one of constant adaptation to an ever expanding empire, yet, so far, this expansion has been over con-



tiguous territory;<sup>3</sup> our political activities have been directed toward adaptations suited to a society occupying such a territory. Our new territorial problems are such as have to do with expansion and colonization over territory not contiguous; in fact, in some cases lying thousands of miles from our shores. The territories which have given rise to this question are:

1. The Hawaiian Islands.—These islands are located about 2,000 miles southwest of San Francisco and in the direct route to Australia and the Oceanic group. They have an area of about 6,640 square miles, a population of about 100,000, about one-half of which is in the city of Honolulu.

2. The island of Cuba—situated less than 100 miles south of Key West. It has an area of about 43,220 square miles, a territory somewhat larger than that of New Jersey, Delaware, Maryland and West Virginia; a population of about 1,500,000. The principal city, Havana, has a population of about 200,000 and seven other cities contain from 23,000 to 70,000 people each.

3. Porto Rico and the other Spanish islands of the West Indian group—having an area of about 4,000 square miles.

4. The Philippines—situated about 5,000 miles west of San Francisco and only a few hundred miles off the coast of Asia. These islands have an area of 114,326 square miles, a territory nearly as large as all New England, together with New York and New Jersey. They have a population estimated at from 7,000,000 to 10,000,000. The principal city, Manila, by the census of 1887 had a

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<sup>3</sup> The single exception to this is Alaska, and even this is on the same continent. But Alaska has required but little of government of any kind; its population has been comparatively small and widely scattered, its territory vast and in the larger parts wholly uninhabited. The conditions there would furnish no criterion for action under circumstances such as those present in the island possessions.

population of 154,062, while four other cities contained from 30,000 to 45,000 souls.

5. The Ladrones and Caroline Islands—two groups of much smaller but more numerous islands situate in the Pacific, lying between the Philippines and Hawaii.

The circumstances which have given rise to the question before us are peculiar. The Sandwich Islands are a small group unable to cope with foreign powers. They have long been knocking at our door. They had been cursed with bad government and rent by revolution. The population had gradually dwindled till at this present time it is only about one-half what it was when European settlement began. For years they had led an independent but precarious existence. Since 1893 the present government has been in control. This government, hampered by the adverse claims of the former royal house, foreign intrigue and domestic political combinations seeking to obtain control in their own behalf, had come to us asking, not that their own rule be perpetuated, but that these islands be allowed to come under the protecting sovereignty of the United States; that they be protected in an autonomous, a representative, government by a nation which was strong enough to cope with adverse powers. After several years of petition and delay, of committees and commissions, the United States, under pressure of the present war, finally decided to comply with this request. But this step being taken, the question still remains as to what adaptation shall be made in our system for its government.

In Cuba a different set of conditions have prevailed. For some time there had been a revolution in progress just off our shores. The people of the island having for ten years (1868 to 1878) waged a war for independence from what they conceived to be a tyrannous Spanish rule, had, under promises of the reforms for which they were struggling, again acknowledged the sovereignty of Spain.

But these promises were violated, and again, in 1894, a considerable portion of the people of the island arose with a determination to cast off the Spanish yoke or yield up their lives as a sacrifice. Since that time the struggle had been maintained and Spain had been unable to restore peace and reassert its sovereignty over a large portion of the island. The methods employed to reduce the insurgents to submission were cruel in the extreme—shocking to every sense of humanity and military propriety. Finally, after repeated official announcements and warnings on the part of our government demanding a cessation of such practices, an armed intervention was declared which involved us in a war with Spain. As a result of this war Cuba has been freed, Porto Rico and the other Spanish West Indian islands have been ceded to the United States and our government has retained possession of certain parts of the Philippines, of the Ladrões and the Carolines pending the establishment of an order satisfactory to the authorities at Washington. This has raised the questions as to what our policy should be relative to Porto Rico, which stands on about the same footing as the Sandwich Islands; what our obligation toward Cuba, what our duty toward the Philippines and the other Spanish possessions in the Pacific which have fallen into our hands by the chances of war.

To those who still declaim against non-interference in the affairs of other nations it has been well answered that, as to the matters in hand, it is now too late to discuss the question. We have already interfered; we have engaged in war on this account, and the conflict has been decided in our favor. The moment that hostilities began all arguments as to the wisdom of interference or non-interference had to be laid aside; it became necessary either to overcome the enemy or ourselves be overcome. However hasty or untimely the act of interference may be thought to have been, the step was taken after a deci-

sion made by the duly constituted authorities. Then the rule of conduct for every citizen became at once shifted; it was no longer "come let us reason together," but "my country, right or wrong, my country." Having interfered in the interest of humanity and good government, having forced Spain to make terms by which cessions of distant territories were made as an indemnity and having retained military possession in Cuba and the islands of the Pacific till a satisfactory settlement shall have been made, we must now decide on the steps further to be taken.

We have announced by resolution that we disclaim any intention to secure Cuba to ourselves. Very well! But, it is asked, is our obligation now discharged toward Cuba and the world? We have broken down the broad sovereignty of Spain. The various island possessions are, so far as Spain is concerned, without protection as against the stronger nations unless that protection is offered by the United States. Furthermore, having undertaken a war for the sake of good government and humanity, is it enough that the rule of Spain shall cease? Another form of tyranny more terrible and more shocking to our sense of humanity may take its place. Our war is not primarily or avowedly against Spain, but in the interests of such a political establishment as an advanced civilization demands. By reason of this fact, it is affirmed that it is quite as obligatory that we see to it that a humane and efficient government be established as that the "Spanish tyranny" be ended; that the world will hold us responsible; our very act of interference makes us responsible as a guarantor of good government.

The Philippines, too, are in a condition quite similar to that of Cuba. A revolution had just taken place—had not at the time of our occupation been wholly repressed. The most cruel methods of warfare had been employed. Before our military occupation of these islands we did

not deem it incumbent on us to interfere there by reason of the great distance of these islands from our shores; claims of humanity upon the attention of other nations were stronger than upon our own. But now, it is urged that that reason cannot be appealed to. These islands are now in our actual possession; we are now nearer to them and in better position to act than is any other civilized nation. For us now to release these islands, for us to allow the former cruelties to be wrought upon them, and perhaps added vengeance to be poured out, when we are in the best position of any nation to prevent it, it is charged, would be to deny the very principles for which the war was undertaken. The United States having taken possession of these islands, the question presents itself to our sober judgment: Is it not incumbent that we do not relinquish control there without a guarantee of such a government as modern civilization demands?

If the question is answered in the negative, then our right to have interfered in the first instance is denied; if our answer be in the affirmative and we accept this as the true theory of our relations to the islands over which we have temporarily thrown our protection, then by what means are we to accomplish the desired end? Shall we again surrender these possessions to Spain? Her whole colonial history has proven a failure; the last of her distant possessions are now parted from her as a result. Shall we cede them to Germany, France or England? There are but few advocates of such a policy, and the question may well be asked: What reason would there be for such disposition? Shall we leave the islands to their own people, unassisted and unrestrained, to be rent by factions and finally to be subdued and brought under orderly government by some stronger power? But little can be said in justification of such a course.

But, assuming that the responsibility is to ourselves alone, as a nation how can we discharge this responsi-

bility? What policy can we adopt which will secure the establishment of order and conserve the interests of good government in the islands and at the same time not endanger our own institutions. An established order most favorable to the highest social and economic development of the islands—one which will allow of broad co-operation—requires that the government in control shall command sufficient force to repel invasion and put down insurrection. For this purpose the several islands, acting independently or even in groups conveniently near, would, under present conditions, be all too small. The broad sovereignty and protecting power of Spain has been broken down; the islands are at present without this condition precedent to their highest well-being. As to the ability of the United States to meet this condition, there is perhaps little question. It was for the purpose of obtaining the protection of a stronger power that the Hawaiians sought admission to our political household; it is to the same end that the people of the several islands that have been in revolt against Spain are now appealing to us for protection. The ever broadening commercial and industrial organization of the leading nations, it is thought, demands that these political establishments reach out; that they extend their sovereignty over the less favored territories when requested so to do in order that their natural resources may receive the highest development; that industry may be conducted with greatest economy, and their people have the conditions present for highest well-being. The present position of the United States indicates to some that the welfare of these smaller jurisdictions would be most highly favored under its protection. But in order to accomplish this end it must be admitted by all that a new colonial polity will have to be adopted; that the policy pursued in the colonization of contiguous territory (territory which after being developed might become a part of a federated

whole governed by a central council or legislature and over which a central administration may extend) will not suffice. The experience of the past has demonstrated also that, except when threatened by superior force, the locality itself can best exercise the functions of government; that the political institutions of a people conserve their welfare only when these institutions are the product of their social and industrial life; that the political establishments must be in harmony with the highest and best interests of a community. A foreign court or government cannot be as thoroughly in touch with these interests as the people themselves. The American revolution of 1775, the Canadian revolution of 1837, the various revolutions of Spanish provinces, the last of which was the one recently in progress, demonstrate this fact. They tell us of the impracticability of the exercise of the functions of government by foreign agencies; our whole National history and that of the colonies of Great Britain since the adoption of her present policy speak of the wisdom of local autonomy. An autonomous government under the protective sovereignty of the United States would, then, be the only form of establishment that would seem well adapted to the fulfillment of our responsibility in case we accepted it. The requirements of such a civil policy would be such as to suggest the establishment of a Federal colonial department, perhaps a sub-department of interior or foreign affairs, devoted to colonial interests similar to that of Great Britain. To make this efficient it would require that our consular and appointive positions be placed under the merit system, instead of being left on a spoils basis as at present.<sup>4</sup>

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<sup>4</sup> This was the conclusion that Great Britain came to several decades since. Before this time the colonial affairs were sorely mismanaged, after the adoption of a professional and meritorious service the affairs of her colonial possessions have been so managed as to be beneficial both to the colony and the central government. Such a change, it is thought, would be of no special

But, conceding the first hypothesis, conceding that the United States is now, by virtue of its act of interference, responsible for the establishment of such a government as is demanded by the highest principles of modern civilization and conceding that a new colonial system suited to the purpose might be adopted, that the economic and social well-being of the islands would be best conserved by the extension of our National sovereignty over them, the other element of the problem must still be taken into account. Can this be done without endangering our own government or encumbering our energies? If not, if it will be to our own disadvantage, or if the advantage will not be mutual, then it must be conceded that we might better let the people of the islands work out their own salvation, or be protected by some treaty arrangement, whereby the best disposition consonant with our own welfare would be made.

In the first place, it would be necessary for us to protect these colonies. We would be required to be ready at all times not only to protect our present territory and the interests of people residing within these limits but also to protect those territories and people which would be brought within the enlarged and widely distributed jurisdiction. To this end, it is argued, that we would need largely increased armies and navies. Prior to the Spanish war we were already expending about \$35,000,000 per annum to keep up our military establishment of 25,000 men, and about \$20,000,000 per annum, besides the cost of construction, for keeping up the navy. Since the war began we have added very largely to our navy and aside from the cost of purchase and construction we

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burden or disadvantage to our government, as the cost would be trivial and it would tend to improve our own consular systems; it would add little or nothing to the burdens of either colony or general government—would, in fact, be advantageous to both. Until this is done, however, we might well distrust the issue of such an undertaking.



may expect that the naval establishment will cost quite as much as the army on the old footing, i. e., \$35,000,000 per annum. It is estimated by some that in case we assume a protectorate for these islands we would at once have to double the naval force and keep a standing army of three or four times the number heretofore required, and enormous pressure is at this time being brought to bear on the central government to this end. This would cost us about \$100,000,000 per annum extra, while on a peace footing, by reason of the newly acquired possessions. These extra annual expenditures, together with the war debt, the increased pension roll and the enlarged civil service necessary in such event, would nearly double our annual expenditures.

To the "professional politician" and the spoilsman, under the present system of National expenditure, this is an inviting prospect, and we may expect that all of the energies of such will be bent toward the establishment of such a policy. To the citizen and the taxpayer it may appear in a different light; it may cause him to doubt whether the step should be taken if such an enlargement of naval and military force is to be required.<sup>5</sup> The nations of Europe and Asia have been and are to-day seriously burdened by their naval and military taxes—taxes not in money alone but also quite as heavy a burden of life and labor drawn into compulsory military service in times of peace. These must be paid for by the nation. The burden ultimately falls on the productive agencies of the nation—the people. Ultimately they very largely fall on wages, as the wage earner can never hope to get more than his share of the product after all expenses of production, including interest, taxes, etc., are paid. The larger the tax burdens the less there will be left for dis-

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<sup>5</sup> If we read the expressions of certain public men and enthusiastic journals we may be still further alarmed at the proposed policy and the obligations involved in these ventures,

tribution in wages and profits. In the past the United States has been on a much better industrial footing than the more warlike nations, and a very large element of advantage has been our freedom from military burdens. In considering the advantage or disadvantage of a foreign colonial policy we must take this into account.

As an incident to this consideration also it must be remembered that at this time there are many millions of dollars appropriated for the conduct of the Spanish war that it has not been necessary to spend in offensive or defensive outlays, and that while we are flushed with victory the politician and the spoilsman will do all in their power to have this spent in such a manner as that they and their friends may profit thereby. A colonial policy will be an added advantage to them. They can appeal strongly to the government and to the people for expenditures in army and naval supplies, for reconstructive offices and salaries, for the expenditure of moneys and the giving of contracts that may serve their ends. The war spirit and the political organization will be used to gain support for the expenditure of these and other millions which if the country were in a more heavily burdened condition it might revolt against. As, in the civil war, it was not more the actual cost of the conflict than the subsequent spoliation that piled up the immense debt upon the people of the United States, so in this may we not fear that it is not so much the actual cost of the war up to the time of peace as the various political machines, the spoils combinations, set in motion and made possible that will become a burden to us? The expense to date has been comparatively small but unless great vigilance is exercised the cost to follow will be much larger. Would a policy of protection to these islands, under the circumstances, so affect the political organization as to retard the readjustment to a peace footing?

The effect of a colonial policy on National expenditure

under such a system of appropriation as is now in vogue at the National capital should also be very closely considered. The war spirit and the increased number of political leeches who always spring up during the prosecution of and immediately following a war are conditions which we cannot safely ignore. The establishment of a new policy of extension will be an added incentive and added reason held out in justification of dangerous methods.

Another side of the case, however, presents itself. Granting, for the sake of this consideration, that, under the circumstances present—circumstances especially favorable to the prevention of spoliation and an early adjustment of the political organization to a peace footing—the American people will be able to avoid the political dangers generally incident to war, is it necessary to increase the military burdens proposed in order to act as protector to the island possessions? In the past we have assumed the attitude of protector to all weaker, independent nations on the western continent by the announcement and support of the Monroe doctrine. This doctrine, dangerous as it may have seemed to our freedom from international controversies, was promulgated while the continent was still very largely possessed by leading European powers. During its continuance a great variety of complications have arisen that have caused us to assert ourselves in opposition to the claims of these powers, on one occasion to actually take up arms in its support. The United States could not have taken an attitude more thoroughly opposed or hostile to European nations; nor could we have assumed an international position better intended to produce discord between ourselves and the transatlantic powers. We asserted, in short, that there should be no more European colonies established in either of the American continents; that while the United States would “not interfere in the

internal concerns" of any European nation "in regard to these continents (North and South America) circumstances are eminently and conspicuously different," and if any European power attempts at any time to extend its political system to any part of this hemisphere the United States will interfere; furthermore, that when a European power shall have lost control over any part of the American territory and an independent government shall have become recognized as exercising sovereignty thereon, then the Monroe doctrine should be considered as applying to the newly recognized independency; that not only was it our duty to resist any attempt of a European government to deprive neighboring republics of their territory but, if necessary, resistance would go to the use of armed force.<sup>6</sup>


And yet we assumed to exercise no control over these minor or independent governments by which international complications might have been avoided. They were left free to carry on diplomatic and international intercourse in their own behalf, to get into any sort of difficulties to which either their disposition or folly might lead them; nevertheless we assumed to assert to the world that in case contests did arise no settlement should be had which would do violence to the protection established in the Monroe doctrine. Under such circumstances as these, even when a large part of our own territory was unprotected, our coasts undefended and unfortified, by reason of the unconquerable nature of our people as demonstrated in the two wars with Great Britain and the marvelous energies and resources of the American nation, displayed not only in these but also in the wars of 1846 and 1861, the United States has not suffered by reason of the smallness of its standing army or navy. About the only use that we have had for an army, in fact,

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<sup>6</sup> See John B. McMaster, "The Monroe Doctrine" Essays, pub. Appleton, 1896, "With the Fathers."

has been that of policing our own Western frontier while colonizing the Territories and establishing government there. We now have little to fear from these quarters. There is no longer any frontier on our continent. We may fear no internal collisions that cannot be met by the State peace authorities and citizen militia. In case we now broaden our territory so as to include distant islands there is no reason, it is claimed, why a large part of these 25,000 men of the standing army may not be taken away from the places where they were stationed before the war to be used for the purpose of policing the new territories while an autonomous government is being established there.

But, further, need we fear any increased danger from foreign complications on account of the assumption of the duties of a protectorate over the islands of the Atlantic or the Pacific? One thing is certain, that if we had possessed Cuba and Porto Rico prior to the recent conflict there would have been no cause for war; we would not have had trouble with Spain. The only European war which we have been engaged in since 1812 has been the present one of intervention in the government of these islands by reason of their being controlled by a foreign power, and that control abused. These islands lying just off our coast, we deemed it our duty to interfere for the sake of humanity. No such intervention would have been undertaken for the Philippines, although the conditions there might have been much worse. The humanities there, like those involved in Armenia, per force of nearness, appealed more strongly to others, before the struggle began and we had gained actual possession. From the standpoint of international relations we will be much more free from danger of complications if all negotiations relating to these islands proceed from Washington than if from the several island courts. More than that, there would be less danger of any intrusions



which might give rise to international controversies if these territories were under the sovereignty of the United States than if they stand alone as weak and independent jurisdictions in which the interests of citizens of other nations are not protected and their rights adjusted by courts recognized by the highest authorities. From the standpoint of international complications, therefore, it is thought that the United States has much less to fear while exercising the functions of political protectorate over these islands under her own sovereignty than when standing upon the Monroe doctrine, or the principles involved in the Samoan difficulty, exercising the function of political protectorate over islands outside of her sovereign jurisdiction. If the possibility or probability of international relations are appealed to, therefore, as a reason for enlarging our naval establishment, this would appear to be without foundation; in fact, if we pursue the logic of the situation we would conclude rather that under such circumstances we might with safety decrease our naval and military offices.

Another argument held out by those seeking to increase the burdens of military establishments, as well as those opposing the accession of the islands, is that our coast line will thereby become more open to attack. Geographically this is admitted. But to those who favor territorial extension and yet who fail to see the necessity of enlarging the military and naval establishments on this account other considerations have greater weight—considerations which appeal to nations in making war upon each other. Suppose that, in case war were declared between the United States and Germany, the latter might succeed in getting military possession of the Philippines or the Sandwich Islands. Would this decide the struggle? When nations go to war the conquest is not complete till the one nation or the other is practically disarmed or put to such disadvantage as to be com-

pelled to sue for peace. The military prowess of the United States would be scarcely disturbed by the loss of these islands; this would have but little weight in an international war; the struggle would be continued notwithstanding such possession on the part of the enemy. The resources of the United States are such that when her energies turn to military activities she need fear no foe. If the warlike instruments were not at once at hand it would be but a question of a short time when they would be. With a comparatively small expense in fortifications we need not fear the destruction of our large coast cities. Suppose that war were declared and that we could not at once force our enemy to terms of peace honorable to ourselves; suppose that it might continue several years before such terms might be had. We need fear nothing from invasion here. In case it became necessary to devote our energies to naval construction in order to win honorable terms we have facilities for such construction in such inland seas as the Chesapeake, the Delaware, Puget Sound, San Francisco' Bay, etc., from which in the course of two years we could turn out a navy as large as any in the world. While such resources are at hand, while we are not incumbered with debt, while our people are united and ready to respond to military duty at the first call, to a man, we need not fear war with any foreign power. It is the ultimate resources that are taken into consideration in estimating the chances of war; it is not the present armament but the fighting possibilities of a nation in bringing into service armaments and war materials and using them to crush its enemies that rulers and national councils take into account before essaying into warlike demonstrations against their neighbors. Suppose that Spain had not been bankrupt; suppose that her industry had not been prostrated by centuries of taxation and exaction; suppose instead that her territory had been a **hive**

of industry; that she had been out of debt and her credit had been unimpaired, it would not have been such an unequal contest. We might have succeeded in finally taking possession of her island possessions, but even then we might have had quite as much trouble in holding them as she herself had done; we would have had to garrison and protect them quite as well. With the fall of Santiago the war would have only begun; larger armies and increased navies would have appeared against us; we could not have hoped to conquer proud Spain till we had invaded her home territory and compelled a surrender by gaining control of her home resources.

The fact of a widely extended coast line is not the fact of most importance in considerations of war; rather, the military possibilities of the whole nation. We will be in far better condition to wage war, as well as to enjoy the benefits of peace, if we free ourselves from debt, reduce our taxation, increase the returns and the inducements to industrial activity, become the most energetic and most wealthy, the best united and the most contented people, than if we incumber ourselves with debt, burden our people with taxes, lessen the return and weaken the inducements to industrial activities, cause our own people to become factious and dissatisfied by reason of the continual maintenance of establishments of war. Let us now suppose that we so increase our military and naval establishments that they cost more for maintenance than our civil establishments, as is the case in most of the European countries; suppose that we compel each citizen to devote three years of his best energies to military service beside, as is the case in Germany; suppose that we float the largest navy and maintain the largest standing army in the world as a result and have with them weakened resources and the other conditions prevalent in Europe. Instead of having strengthened ourselves among nations we will have become much weakened. It is doubtful



whether such a nation could survive; whether, on the other hand, it would not, as did the Roman Empire, the Carlovingian Empire and the French Empire, fall from its own weight, unable to support its own superstructure.

Assuming, again, that it will not be necessary to burden our system with a large military establishment in case we extended our sovereignty, another aspect presents itself—the civil side of the government of the islands. These peoples, the inhabitants of the islands, are of various kinds and degrees of education and civilization; many are at present quite incapable of representative self-government. In some of the Philippines they maintain a government peculiar to themselves; in other places the illiterate form such a large proportion of the population, itself largely Indian or negro, that it may require years of education and orderly conduct of affairs to bring them to a point where government similar to our own is practicable. How can this motley and complex aggregation be governed without involving us in expense and making the newly acquired possessions both a burden and a source of corruption at home? These problems have been successfully solved by Great Britain, but not till she had adopted three principles of organization, viz.: First, local autonomy wherever this was practicable; second, a merit system of appointments in administration of colonial affairs in so far as not representative; third, a system of national expenditures based on careful estimates and expert disbursement. These would seem essential to an efficient and safe colonial government. As to the tax burdens of the system the experience of Great Britain, as well as our own, has solved the problem in the past by letting each local or colonial jurisdiction bear its own burdens of government.

Reasoning from our own experience in colonization and expansion and from that of Great Britain, it is urged that little is to be feared from the results.

recent war, even if we decide to extend our sovereignty over the captured islands and such other weak independencies as may hereafter appeal to us for protection; that we are able to secure the establishment of order, conserve the interests of good government in the islands and at the same time not endanger our own institutions. But this conclusion, it must be noticed, is based on certain assumptions quite essential to its validity, viz.:

1. That the patriotic activities which have lead to success in arms will now be directed to an economic and safe adjustment of our political organization to a peace footing in order that the waste and spoliation that usually follows successful warfare may be averted.

2. That the extension of the sovereignty of the United States over these island possessions for their protection will not increase our own burdens for maintaining our military establishment.

3. That in establishing such a polity we may also adopt a new and more economic system of National appropriations.

4. That we so adjust the civil establishment as to secure (a) an autonomous government in the islands wherever practicable, (b) a merit system of appointments.

5. That the broader political organization given by this policy proposed will be of added commercial and industrial advantage to us, so that our resources shall be strengthened and that we may be in better economic as well as social condition to withstand the National strain of an international struggle in the event of such an engagement.

Unless these conditions precedent can be complied with we might well not only hesitate but refuse to advance further in the policy of territorial expansion. In any case, it is of far greater importance to us as a nation that every citizen become an active partisan for the payment of the National debt, the economic expenditure of its

resources, the reduction of its tax burdens and an equitable administration of its tax system. Prosperity and political unanimity in support of the government is far more important to the greatness of the nation than any other policy that may be adopted. With a wise administration at home, as trade and commercial interests expand, we will at all times be in condition to extend our sovereignty over any weaker nations who may seek our protection. We must always have a care, however, that this expansion conform to the economic law of advantage; otherwise we ourselves, as well as our wards, will be weakened instead of strengthened.

## CHAPTER XVII.

## THE DUTIES OF CITIZENSHIP—CONCLUSION.

As already observed, the state or "body politic" presents two essentially different aspects. On the one hand is the legal, the constitutional, the structural element; on the other is the political, the active, the directive. The latter being the element which molds and fashions the law, which gives direction to the institutional, it is this to which we must turn in a consideration of the duties of citizenship. However repulsive the word "politics" may be to some; however unholy its associations have been in the past, the political life being the fountain head of government we cannot hope to purify its currents without beginning here. The national life being involved in its political activities it must be to these activities that duty applies.

But political activities are social in their nature. Political action involves agreement among the people. In a country like our own, there must be an agreement among at least a majority of the members of the political state before any institutional change can be made. One member may form a judgment as to the necessity for action of a particular kind, but before that action can be taken this individual judgment must receive the sanction of many others. There must be agreement: (1) as to what point of the political machine is out of order, i. e., out of harmony with the attainment of the greatest public good; (2) as to the particular change necessary to put the political organism into such adjustment with conditions present as to accomplish the end desired. *In considering the duties of citizenship we have to do*

with the manner and means of bringing about such agreement, thereby shaping political action to the attainment of the general weal.

But the security of the general welfare being admitted as the end of political activity, who is to determine what that welfare is? When complaint is made of the established order, or a change is proposed, who shall be the arbiter? The people. But by what standard, norm, or law are they to judge? Shall we say self-interest? Then again the question presents itself; by what rule of self-interest? In other words, the estimate of the individual as to what will be his highest interest will depend on his training, his education, his standard of life. The first duty of the citizen, therefore, must be that of establishing and maintaining such standards of life and action among his fellows as will lead them to act in accord with the highest principles of life and social well-being. It is with considerations of this kind that the school, the church, teachings in the social sciences and other means of public instruction have to do. The ability of society to act according to some standard which will not do violence to the demands of a progressing civilization is the dividing line between ability to control by self-government and the necessity for monarchy. History having demonstrated that the strongest and most advantageous form of political organization is one of broad co-operation—local self-government under the protection of a broad protective polity—the duty of the citizen to maintain the conditions necessary for the maintenance of such a system is plain.

The norm, such as it is—being present in the mind and thought of each individual—it now becomes necessary to consider the duties of citizenship as to the manner and means of securing popular agreement:

First, as to the part of the political machine that is out of adjustment. This presupposes knowledge of condi-

tions present. Without this knowledge one would not be competent to judge, by any norm, whether or not the political machine were out of adjustment. To the end that the citizen might be in touch with his surroundings, we have established the constitutional guarantees of peaceable assembly, free thought, free speech, and free press, and made provisions for giving publicity to official acts and for official inquiry into subjects of public interests, executive messages, government reports, etc. The newspaper also has been a potent instrument in keeping the people informed; its inquirers and reporters are on every hand seeking for the information desired, they are untiring in their efforts, they have been of incalculable service to the public. The independent press has also done much. In short, it may be said that the organs for procuring and disseminating knowledge of conditions have been provided. It is the duty of the citizen to make use of them; to encourage efforts at investigation and the publication of results.

As to this form of agreement, however, the people have usually had little difficulty. We may congratulate ourselves that by means of these several agencies we are kept well in touch with our institutions; that we usually know what parts of our political system are out of adjustment. When it is stated that at the present time the interests of the people are suffering by reason of incompetency in office, inequality in elections, the employment of the spoils system in appointments, legislative corruption or the subversion of municipal government in the interest of organized spoliation, the majority are agreed. Or if we are more specific in our statement of conditions and affirm that legislative corruption, for example, appears in the election of United States senators, the gerrymander, etc., this would be consented to. But the query is at once raised: "What are we going to do about it?"

This brings us to a third consideration, a third duty of citizenship. The citizen must not only know but act, and acting he must not only think and act for himself but think and act in such a manner that he can get into agreement with others. What are we going to do about it? This is a question that comes home to each citizen when he learns of conditions adverse to the welfare of society and his own interests. In the preceding chapter some suggestions have been made as to a means of adjusting the political organism to conditions present. These, however, are but the expression of individual opinion—a private judgment. Having thought on the conditions which have produced maladjustments, relying on the experience of society in the past in this and other nations, these conclusions have been reached. They signify nothing more; the solution is not yet. Others may think, and reach conclusions of their own. They may not agree. The judgment of the individual must stand the test of the discretion of the people. Popular reason may discover that modifications other than those suggested are better adapted to the ends of the state. Be that as it may, it cannot be doubted that modifications are necessary, and from this arises the duty of decision—of agreement as to a fitting remedy.

Contrary to the ordinary concept, society does not act as an organic whole. It does not think as a body. It is the individual that does the thinking and the acting and what is commonly referred to as the acts of society or of the state or of the government, are acts of the individual co-operating in a manner agreed upon with others. When any attempt is made to bring about a change in the order of things, there is always disagreement between the individual members of the state; a conflict ensues; there is turmoil, hesitation, uncertainty. In the first place, there is a conflict of interest. Change in the established order involves such a readjustment as

will in some manner affect the interests of those who are benefited by the old order of things which it is proposed to modify. In the second place, there is a conflict of ideas. From the nature of things a majority of the people, at the time a change is proposed, are against change. That is, they have become accustomed to thinking and acting in co-operation with others in a certain manner; and it will require an increased effort on their part to think and act in harmony with others in any other manner. Then there is variety of opinion as to the expediency of one measure or another. Those who are directly benefited by the established order use every means within their reach in opposition. They at first try to convince those around them that the present order is best; failing in this they then attempt to show the weakness, the injustice, the evils that will follow the modification proposed. When large interests are affected this opposition becomes very powerful. Our political campaigns evidence the opposition to certain changes in the law proposed. For example, it is proposed to lower the tariff rates. At once all of those enterprises which would be deprived of the quasi monopoly theretofore enjoyed combine their money and their energies. Orators take the stump, pamphlets are issued, appeals are made to the prejudices of the people, all of the patriotic instincts are aroused as a means of affecting the minds of citizens in the interest of maintaining the established order; the support of the machinery of party organization is secured as a means of opposing change. Again, it is proposed to change the political system in such a manner that the President shall be elected by the people directly. At once the leaders of both parties—the politicians who have theretofore dominated the nominations and elections by corruptly controlling “doubtful States” and districts, together with all others who hope to secure favors through them—at once seek to demonstrate that the present or-



der is best, or, failing in this, that the order proposed would be of still greater disadvantage to the people in their attempts to secure good government. In the discussion which follows there may be a lack of agreement as to the change proposed and the old order is still retained. Against all this opposition the people must determine what their course shall be. Each citizen has the double task of deciding what is the best course to pursue and at the same time of overcoming opposition to this course in others till a majority shall have become convinced of the desirability of the change.

Mutual decision requires mutual consideration. In this consideration, where conflicts of interest are involved, we cannot hope to have the undivided support of the organs which are instrumental in moulding popular opinion. They are equally free to champion "the established order" or the "change" proposed, as their interests may dictate. The newspaper, being in one of its aspects a money-making institution which looks to public patronage for its revenues, is often the last to become the advocate of a cause that is at first unpopular. When large interests are opposed and the forces in opposition great, it more often follows or simply expresses popular opinion than leads. Many of the newspapers, too, are controlled by those whose business interests would be affected by the change proposed or suggested. The same may be said of the public man, be he legislator, office-seeker or party manager. The newspaper, the public man or partisan may do much by way of advocacy; they may present the issues on their own side of the case with such force and ability that the people having heard the question discussed by all the parties interested, may be the better able to reach a decision on the merits of the question; but on account of their dependence on the support of popular opinion and the bids which they make for popular favor, we must generally look to other

agencies for the initiative of a political movement—agencies which are independent of partisan action and public favoritism.<sup>1</sup>

These agencies must be with the people themselves. They are found in private association, in voluntary societies, in independent parties—having their own methods of consideration and discussion. The service which these agencies have rendered cannot be overestimated. The beginning may be small; it may be the result of the interest and enthusiasm of one man who, being alive to the evils arising from a certain order of things, draws the attention of his neighbors to it and proposes a change by way of remedy. The change proposed seems reasonable and for the best interest. By association and organization the sentiment grows, societies are formed for the discussion of the evils detailed and the remedy proposed; popular opinion is moulded; the people begin to make more general demands; the pulpit, the press, the public speaker, the politician desirous of riding into power on a wave of popular opinion, take it up, and it becomes a leading issue in a great campaign. The judgment of the nation is appealed to and a decision favorable or unfavorable, as the case may be, is rendered.

In our various cities, towns, villages, and school districts are found many thousands of independent voluntary associations organized for the purpose of discussing

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<sup>1</sup> As examples, we might refer to the time when the wild-cat banking craze was on. Then, though such a condition was supported neither by reason, justice or public welfare, by virtue of the fact that a large majority of the people were interested, directly or indirectly, in the speculative enterprises which are fostered by ill-founded issues of credit, and conceived themselves to be benefited thereby, scarcely a newspaper or a public man could be found in the regions affected who would raise a voice in disapproval. Or again, after the civil war, when partisans were being rewarded by private pensions, by reason of the fear that popular disapproval might be aroused against them by demagogical appeals to patriotic sentiment—a sentiment which was played on most successfully by those who were despoiling the nation—the voices of popular leaders were silent.

public questions. They hold meetings, listen to carefully prepared papers, engage in criticism or debate, they publish independent papers and pamphlets—the result of special investigation or consideration—they use every means of becoming informed, of reaching a decision among themselves as to modifications desired, and then of convincing others through press and private associations. The influence of these societies is felt not only in moulding popular opinion, but also in opposing arbitrary acts on the part of the government. Let a bill be introduced into the legislature that is opposed to the public welfare and these local societies stir up the people to express themselves by memorial and communicate with their representatives till the tide becomes too strong for resistance. Legislative action is stopped and the distasteful measure becomes a dead letter. The force of the independent voluntary association is inestimable. This was the means employed by the revolutionary fathers to resist the arbitrary demands of the British crown and parliament. It was in the “committee of correspondence” and kindred organizations that opposition to the established order was organized, and from which proceeded the new political formations in the colonies. It was in such independent voluntary societies that the French Revolution assumed a definite form. Here the people discussed the affairs and decided on a course of action. This was the force that drove Louis from the throne. But in France the oppressed alone reasoned together. They did not see the other side of the question. They were not impressed with the necessity for an orderly change, such that in modifying a part of their system the whole organism would not be thrown out of working order. Those in power, those who were benefited by the unjust order of things which prevailed, and against which the people complained, held themselves aloof; they ignored the popular activities as manifested

in these societies; their voices were not heard; no compromises of thought and action were asked for; they sought to govern the action of complainants by the use of physical power. The result was that when the oppressed party came into power it was quite as arbitrary and unjust as had been those who had oppressed them. Questions of taxation present themselves to the people; certain evils exist. Those who are active in the consideration of modifications in the interest of equity, those who are endeavoring to apply the principle of taxation according to ability are not the men of wealth. These have held themselves away from all consideration of reform; they have been absent from citizen meetings held for the discussion of such topics; most of them have been contented to avoid the issue and continue in their practices of evasion and corruption by which they have profited. Such an attitude must force the majority to take action without their council and consent. If such men—the men of wealth—would bring themselves into active co-operation with those who are endeavoring to make a proper adjustment of such questions, an agreement would not be difficult, and when arrived at would rest on a just consideration of all interests. But when those who are enjoying the fruits of inequity seek to oppose all inquiry on the one hand and, in the face of popular disapproval, attempt to subvert the system that has been adopted, they must expect arbitrary treatment, at times, as a reward.

Many of the men of wealth and highest ability are beginning to recognize the fact. In the large cities, especially where, on account of the greater inducement to control, the public interests have suffered most, the leaders in industrial affairs and professional life, those who have pushed their way to the head of large corporate establishments and business associations, those who lead in the legal profession, and in journalism, in short, the

recognized leaders in the affairs of life, are beginning to take the lead in the political activities represented in these independent citizen organizations. The Reform Club of New York City, the Municipal Voters' League of Chicago, and many other societies, are largely made up of such. These natural leaders of men have come to realize the necessities for such action and the obligation that rests upon them as citizens to assist in the adjustment of our institutions to securing the public welfare. Some effort has been made to make the work more systematic; to stir up the citizens to a keener perception of their duties; to place within the schools books that will give to the young American the best standards of political thought; to increase the number of citizen organizations for the study of social and political conditions and their manner of treatment in the leading nations; to discuss the problems of the day as they arise, and endeavor to arrive at an agreement as to the best manner of solution. Such questions as the inequalities of suffrage in elections and the retention of the spoils system in certain departments of government are among the first that must demand the attention of the citizen, for it is by these inequalities that the politician is enabled so effectively to amass the forces under his command for the defeat of those well directed efforts of citizens who, having independent organizations, have not the power to cope with him in the arts of campaigning. In fact, the methods of citizens organized for the consideration of public questions are of a different kind. The citizen organization seeks to mould popular sentiment and to have its results shown in a "free" and "equal" expression. The politician seeks to win by artifice and corruption. The inequality of elective power as it appears under the present system is the opportunity, the circumstance favorable to his success.

By the spoils system the state is constantly holding out

to the designing an inducement for defeating the expression of popular sentiment and corrupting the government. It lessens the efficiency of the public service, it makes uncertain the administration of the law. The necessity for broadening the application of the merit system appears on every hand. The ability of a government such as our own to perform its functions with a proper regard for public welfare and the expansion of those functions as a means of providing for the ever increasing and ever broadening economic interests of the people depend on the highest efficiency. This cannot be obtained in the public service by having a new and inexperienced corps in the public service with every change in administration. By operation of the spoils system, the administrative, clerical and ministerial officers and employees are turned out just as they have begun to acquire competency. They are the machinery by which the government is run; the question presents itself to the American citizen: is it necessary to break down the machine and then build another one, like in mechanism but less efficient owing to crudeness, in order to give direction to its activities? The way that direction and control is secured in ordinary business affairs, is to get a new manager whenever the old one has not been able to operate a machine satisfactorily. Suppose, for example, that President Lincoln had become dissatisfied with the management of General Grant in the Virginia Campaign, and on that account he had discharged his whole army and organized a new and untried force to take Richmond. The sacrifice would have been great. The only reasonable way for Mr. Lincoln to have acted under such circumstances would have been to have retained that well organized and experienced army, but put a new general at its head. The same reasons apply in the civil as in the military service. In the military the principles of efficiency become a necessity, as ineffi-

ciency means extermination. In the civil the principle of efficiency becomes equally necessary, as under the constantly changing economic conditions inefficiency means stagnation and decay—if persisted in it means the fall of that form of government which retains it in its civil service. Society at present demands a government which is under its direction and in touch with its interests; it also demands a government which will be most efficient in the services to be rendered under its elective managers. Equality in elections and an efficient administration are essential to the success of citizen government.

The other problems have to do with adjustments which will secure a reduction of the inducements to subversion and control of the functions of government in the interest of the few and the efficient execution and administration of the law as established by the people through their agents in the interest of the many. The sovereign and the people being one, the highest welfare is secured by provisions for the execution and administration of the will of the sovereign as found in the authentic expression of a majority of the people.

The existence of conditions adverse to the general welfare—which give opportunity for one class to live by “spoliation” of the other members of society—is productive of two classes of thinkers. In political action are found those who, on account of personal interests, are for and those who are against such “change” in the established order as will produce an adjustment of institutions to the accepted norm of the modern State—the general welfare. In political philosophy we have, as extremists, the pessimist and the fatalist on the one hand and the revolutionist and the anarchist on the other. The pessimist tells us that conditions are deplorable but that there is no help for them; the only thing to do is simply to let things go on as they are, for a struggle would only result in a waste of time and energy. The fatalist admits that

the lot of the majority is harder than it should be from an ideal point of view, but that these conditions are the result of uncontrollable forces—the progress of the age—or that they are so ordained; that the only thing for society to do is to accept these conditions and labor on. The revolutionist would correct the evils by first tearing down the entire political establishment and then erecting another better suited to his ideals of government. The anarchist prescribes a permanent demolition of the social political fabric; that individual prowess be the rule. Thus the strong individual may be allowed to develop and exercise his highest powers unhampered by the social constraints established to protect weaklings. The effects of pessimism upon the political activities of a people may be seen in the history of India and China. The results of revolutionary doctrine appear in France. The tenets of the anarchist are found in the writings of Herr Most, Ragnar Redbeard and others. Mr. George Harris and Prof. Bernard Moses may be considered as representatives of the modern fatalist.<sup>1</sup>

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<sup>1</sup> The recent publication of Mr. Harris' "Inequality and Progress" is fairly representative of fatalism when viewed from the standpoint of the individual. The individual is born that way, therefore he cannot expect to be anything other than he is and when the State interferes it stands in the way of progress. The work of Prof. Moses, "Democracy and Social Growth," first postulates that democracy is based on the assumption of equality. He then proceeds to show that the whole tendency of the age has been in the direction of inequality. That the modern economic systems based on division of labor, differentiation of industry, centralization of control, etc., have served to drive the extremes wider apart; that the whole modern co-operative system is productive of greater inequality. Therefore, the reader is left to the conclusion that democracy is ultimately doomed. The method employed by the first class, that represented by Mr. Harris, is that of begging the whole question. They at first set up a "straw man" and then proceed to its complete demolition. The method employed by the latter class, that represented by Prof. Moses, is that of using a very partial statement of facts from which they draw their conclusions. While their statements of fact relative to the economic tendency may be granted, they seem to have entirely ignored the facts that, while this economic evolution has been going on, govern-



The experience of the past gives little color to the doctrines of any of these extremists in political thought. When we consider the conditions that have confronted our people; that during the last century our population has increased from about five millions to seventy-five millions; that this population has spread from a narrow line of settlement along the Atlantic seaboard across the continent, over an area larger than all Europe; that, in the course of this expansion, immigrants have poured in from every quarter—people who have lived under a diversity of governments, having diverse ideals, accustomed to an environment quite different from our own; that many of these people have been so oppressed in foreign lands that they had come to oppose all government; that by colonization and expansion the people in new areas have been continually forming new States; that the first federation of thirteen has now expanded till it includes nearly fifty Commonwealths, each having a government of its own establishment, exercised under the general plan; when we further consider that during this process of broadening territorial jurisdiction and rapid increase in population still greater social and economic changes have taken place, making new adaptations necessary; that under all these conditions of change the people have in an orderly and conservative manner modified their laws and institutions so as to adapt them

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ment, both in America and the leading European countries, has been growing more democratic; that, during this time, the content of the "political state" has been broadened; that the qualifications for suffrage and office holding have been diminished; that the rights of participation in acts of government have been extended; that the whole tendency of the age, politically speaking, has been toward a decrease of the powers of the extremes represented by conquerors on the one hand and revolutionists on the other, and toward an increase in the powers of the common people—the middle class, those who are most nearly on a basis of equality from every point of view. As these facts have been ignored, so too has the fact that our laws, both public and private, have been continually remodeled to the end of maintaining an equality, political and legal, theretofore wholly unknown.

to the growing and varying needs of an empire; that they have, with few precedents to guide them, established and maintained a government which has stood the test of one civil and three foreign wars; that they have, under these adverse conditions, not only been able to meet every crisis, civil and military, which has presented itself, but at the same time have given to the world some of its highest ideals of government; when we consider all this, it is with pride and gratitude that we reflect on the grandeur and strength of our sovereign, the People of the United States. The accomplishments of the past assure us that there will be a successful issue of the political questions of to-day. We may look to the future with confidence that conflicts of interest will be adjusted and such modifications made from time to time as may be necessary to adjust our institutions to the security of the general welfare of the nation.



# APPENDIX.

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## I.

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### CORRUPT PRACTICE ACTS OF GREAT BRITAIN.

The Public General Statutes, 46 and 47 Vict., ch. 51.  
The Law Reports, 1883, pp. 242-285.

An act for the better prevention of Corrupt and Illegal Practices in Parliamentary Elections. [25th August, 1883.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Common, in this present Parliament assembled, and by the authority of the same, as follows:

#### CORRUPT PRACTICES.

I. Whereas, under section four of the Corrupt Practice Prevention Act, 1854, persons other than candidates at Parliamentary Elections are not liable to any punishment for treating, and it is expedient to make such persons liable; be it therefore enacted in substitution for said section four as follows:

(1) Any person who corruptly, by himself, or by any other person, either before, during or after an election, directly or indirectly, gives or provides, or pays wholly or in part the expense of giving or providing any meat, drink, entertainment or provision to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or bring about to vote or refrain from voting at such election, shall be guilty of treating.

(2) And every person who corruptly accepts or takes any such meat, drink, entertainment or provision shall also be guilty of treating.

2. Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of or threaten to make use of any force, violence or restraint, or inflict or threaten to inflict, by himself or any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall, by abduction, duress or any fraudulent device or continuance, impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce or prevail upon any elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence.

3. The expression "corrupt practice" as used in this act means any of the following offenses, namely, treating and undue influence, as defined by this act, and bribery and personation, as defined by the enactments set forth in Part III. of the Third Schedule to this act,<sup>1</sup> and aiding, abetting, counselling and procuring the commission of the offense of personation; and every offense which is a corrupt practice within the meaning of this act shall be a corrupt practice within the meaning of the Parliamentary Elections Act, 1868.

4. Where, upon trial of an election petition respecting an election for a county or borough, the election court, by the report made to the Speaker in pursuance of section eleven of the Parliamentary Elections Act, 1868, reports that any corrupt practice other than treating or undue influence has been proved to have been committed in reference to such election by or with the

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<sup>1</sup> The enactments referred to, and which define bribery and personation, are the following: The Corrupt Practices Prevention Act, 1854, 17 and 18 Vict., C. 102, §§ 2, 3; The Representation of the People Act, 1867, 30 and 31 Vict., C. 102, § 49; The Representation of the People Act, 1868, 31 and 32 Vict., C. 48, § 49; The Ballot Act, 1872, 35 and 36 Vict., C. 33, § 24; The Universities Elections Amendment Act, 1881, 44 and 45 Vict., C. 40, § 2.

knowledge and consent of any candidate at such election, or that the offense of treating or undue influence has been proved to have been committed in reference to such election by any candidate at such election, that candidate shall not be capable of even being elected to or sitting in the House of Commons for the said county or borough, and if he has<sup>2</sup> been elected, his election shall be void; and he shall further be subject to the same incapacities as if at the date of the said report he had been convicted of an indictment of a corrupt practice.

5. Upon the trial of an election petition respecting an election for a county or borough, in which a charge is made of any corrupt practice having been committed in reference to such election, the election court shall report in writing to the Speaker (of the House) whether any of the candidates at such election has been guilty by his agents of any corrupt practice in reference to such

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<sup>2</sup> Instead of leaving the question to a political body dominated by the successful party, the English system provides that "The trial of every Election Petition shall be conducted before a Puisne Judge of One of Her Majesty's Superior Courts of Common Law." This court is to be made up as follows: "The members of each of the Courts of Queen's Bench, Common Pleas, and Exchequer in England and Ireland shall respectively, on or before the Third Day of Michaelmas Term in every year, select, by a majority of votes, one of the Puisne Judges of such court, not being a member of the House of Lords, to be placed on the Rota for the Trial of Election Petitions during the ensuing year." The trial is without a jury, and "at the conclusion of the Trial the Judge who tried the Petition shall determine whether the member whose Return or Election is complained of, or any and what other Person, was duly elected, or whether the election was void, and shall forthwith certify in writing such Determination to the Speaker, and upon such Certificate being given such Determination shall be final to all Intents and Purposes." Where any charge of corrupt practice is made the court is also required to find "(a) whether any corrupt Practice has or has not been proved to have been committed by or with the knowledge and consent of any Candidate at such Election, and the nature of such corrupt Practice; (b) The names of all Persons (if any) who have been proved to have been guilty of any corrupt Practice; (c) whether corrupt Practices have or whether there is Reason to believe that corrupt Practices have extensively prevailed at the Election to which the Petition relates." The Judge may also at any time make a special report as to matters arising in the course of the trial which in his judgment ought to be submitted to the House of Commons. See Act 1868.

election; and if the report is that any candidate at such election has been guilty by his agents of any corrupt practice in reference to such election, that candidate shall not be capable of being elected to or sitting in the House of Commons for such county or borough for seven years after the date of the report, and if he has been elected his election shall be void.

6. (1) A person who commits any corrupt practice other than personation, or aiding, abetting, counselling, or procuring the commission of the offense of personation, shall be guilty of a misdemeanor, and upon conviction or indictment shall be liable to be imprisoned, with or without hard labor, for a term not exceeding one year, or to be fined any sum not exceeding two hundred pounds.

(2) A person who commits the offense of personation, or of aiding, abetting, counselling, or procuring the commission of that offense, shall be guilty of felony, and any person convicted thereof on indictment shall be punished by imprisonment for a term not exceeding two years, together with hard labor.

(3) A person who is convicted on the indictment of any corrupt practice shall (in addition to any punishment as above provided) be not capable during a period of seven years from the date of his conviction:

(a) Of being registered as an elector or voting at any election in the United Kingdom, whether it be a parliamentary election or an election for any public office within the meaning of this act; or

(b) Of holding any public or judicial office within the meaning of this act; and if he holds any such office the office shall be vacated.

(4) Any person so convicted of a corrupt practice in reference to any election shall also be incapable of being elected to and of sitting in the House of Commons during the seven years next after the date of his conviction, and if at that date he has been elected to the House of Commons his election shall be vacated from the time of such conviction.

ILLEGAL PRACTICES.

7. (1) No payment or contract for payment shall, for the purpose of promoting or procuring the election of a candidate at any election be made—

(a) On account of the conveyance of electors to or from the poll, whether for the hiring of horses or carriages, or for railway fares or otherwise; or

(b) To an elector on account of the use of any house, land, building, or premises for the exhibition of any address, bill, or notice, or on account of the exhibition of any address, bill, or notice; or

(c) On account of any committee room in excess of the number allowed in the first schedule of this act.

(2) Subject to such exceptions as may be allowed in pursuance of this act, if any payment or contract for payment is knowingly made in contravention of this section either before, during, or after an election, the person making such payment or contract shall be guilty of an illegal practice, and any person receiving such payment or being a party to any such contract, knowing the same to be in contravention of this act, shall also be guilty of an illegal practice.

(3) Provided that where it is the ordinary business of an elector as an advertising agent to exhibit for payment bills and advertisements, a payment to or contract with such elector, if made in the ordinary course of business, shall not be deemed to be an illegal practice within the meaning of this section.

8. (1) Subject to such exception as may be allowed in pursuance of this act, no sum shall be paid and no expense shall be incurred by a candidate at an election \* \* \* on account of or in respect of the conduct or management of such election, in excess of any maximum amount in that behalf specified in the first schedule to this act.

(2) Any candidate or election agent who knowingly acts in contravention of this section shall be guilty of an illegal practice.

9. (1) If any person votes or induces or procures any person to vote at any election, knowing that he or such



person is prohibited, whether by this or any other act, from voting at such election, he shall be guilty of an illegal practice.

(2) Any person who, before or during an election, knowingly publishes a false statement of the withdrawal of a candidate at such election for the purpose of promoting or procuring the election of another candidate, shall be guilty of an illegal practice.

(3) Provided that a candidate shall not be liable, nor shall his election be avoided, for any illegal practice under this section committed by his agent other than his election agent.

10. A person guilty of an illegal practice, whether under the foregoing sections or under the provisions hereinafter contained in this act, shall, on summary conviction, be liable to a fine not exceeding one hundred pounds, and be incapable, during a period of five years from the date of his conviction of being registered as an elector or voting at any election (whether it be a parliamentary election or an election for a public office within the meaning of this act) held for or within the county or borough in which the illegal practice has been held.

11. Whereas, by sub-section fourteen of section eleven of the Parliamentary Elections Act, 1868, it is provided that where a charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the judge shall report in writing to the Speaker as follows:—

(a) “Whether any corrupt practice has or has not  
“been proved to have been committed by or with the  
“knowledge and consent of any candidate at such  
“election, and the nature of such corrupt practice;

(b) “The names of all persons, if any, who have  
“been proved at the trial to have been guilty of any  
“corrupt practice;

(c) “Whether corrupt practices have, or whether  
“there is reason to believe corrupt practices have ex-  
“tensively prevailed at the election to which the prac-  
“tice relates;”

And whereas, it is expedient to extend the said sub-section to illegal practices,

Be it therefore enacted as follows: Subsection fourteen of section eleven of the Parliamentary Elections Act, 1868, shall apply as if that subsection were herein re-enacted with the substitution of illegal practices within the meaning of this act for corrupt practice; and upon the trial of an election petition respecting an election for a county or borough, the election court shall report in writing to the Speaker the particulars required by the subsection as herein re-enacted, and shall also report whether any candidate at such election has been guilty by his agents of any illegal practice within the meaning of this act in reference to such election, and the following consequences shall ensue upon the report by the election court to the Speaker: (that is to say)

(a) If the report is that any illegal practice has been proved to have been committed in reference to such election by or with the knowledge and consent of any candidate at such election, that candidate shall not be capable of being elected to or sitting in the House of Commons for the said county or borough for seven years next after the date of the report, and if he has been elected his election shall be void; and he shall further be subject to the same incapacities as if at the date of the report he had been convicted of an illegal practice; and

(b) If the report is that a candidate at such election has been guilty by his agents of any illegal practice in reference to such election, that candidate shall not be capable of being elected to or sitting in the House of Commons for the said county or borough during the Parliament for which the election was held, and if he has been elected, his election shall be void.

12. Whereas, by the Election Commissioners' Act, 1852, as amended by the Parliamentary Elections Act, 1868, it is enacted that where a joint address of both Houses of Parliament represents to Her Majesty that an election court has reported to the Speaker that corrupt practices have, or that there is reason to believe that corrupt practices have extensively prevailed at an election in any county or borough, and prays Her Majesty to cause inquiry under that act to be made by persons named in such address (being qualified as therein mentioned), it shall be lawful for Her Majesty to appoint

such persons to be election commissioners for the purpose of making inquiry into the existence of such corrupt practices;

And whereas, it is expedient to extend the said enactments to the case of illegal practices:

Be it therefore enacted as follows:

When election commissioners have been appointed in pursuance of the Election Commissioners' Act, 1852, and the enactments amending the same, they may make inquiries and act and report as if corrupt practices in said act and the enactments amending the same included illegal practices; and the Election Commissioners' Act, 1852, shall be construed with such modifications as are necessary for giving effect to this section, and the expression corrupt practice in that act shall have the same meaning as in this act.

#### ILLEGAL PAYMENT, EMPLOYMENT AND HIRING.

13. Where a person knowingly provides money for any payment which is contrary to the provisions of this act, or for any expense incurred in excess of any maximum amount allowed by this act, or for replacing any money expended in any such payment or expenses, except where the same may have been previously allowed in pursuance of this act, to be an exception, such person shall be guilty of illegal payment.

14. (1) A person shall not let, lend, or employ for the purpose of the conveyance of electors to and from the poll any public stage or hackney, carriage, or any horse or other animal kept or used for drawing the same, or any carriage, horse or other animal which he keeps or uses for the purpose of letting out for hire, and if he lets, lends, or employs such carriage, horse, or other animal, knowing that it is intended to be used for the purpose of conveyance of electors to or from the poll, he shall be guilty of an illegal hiring.

(2) A person shall not hire, borrow, or use for the purpose of the conveyance of electors to or from the poll any carriage, horse, or other animal which he knows the owner thereof is prohibited by this section to let, lend or employ for that purpose; and if he does so he shall be guilty of illegal hiring.

(3) Nothing in this act shall prevent a carriage, horse, or other animal being let to or hired, employed, or used by an elector or several electors at their joint cost, for the purpose of being conveyed to or from the poll.

(4) No person shall be liable to pay any duty or to take out a license for any carriage by reason only of such carriage being used without payment or promise of payment for the conveyance of electors to or from the poll at an election.

15. Any person who corruptly induces or procures any other person to withdraw from being a candidate at an election, in consideration of any payment or promise of payment, shall be guilty of illegal payment, and any person withdrawing, in pursuance of such inducement or procurement, shall also be guilty of illegal payment.

16. (1) No payment or contract for payment shall, for the purpose of promoting or procuring the election of a candidate at any election, be made on account of bands of music, torches, flags, banners, cockades ribbons, or other marks of distinction.

(2) Subject to such exception as may be allowed in pursuance of this act, if any payment or contract for payment is made in controvention of this section, either before, during, or after an election, the person making such payment shall be guilty of illegal payment, and any person making such contract or seeking such payment shall be guilty of illegal payment if he knew the same was made contrary to law.

17. (1) No person shall, for the purpose of promoting or procuring the election of a candidate at any election, be engaged or employed for payment or promise of payment for any purpose or in any capacity whatever except for any purposes or capacities mentioned in the first and second parts of the First Schedule of this act, or except so far as payment is authorized by the first or second acts of the First Schedule to this act.

(2) Subject to such exception as may be allowed in pursuance of this act, if any person is engaged or employed in contravention of this section, either before, during, or after an election, the person engaging or employing him shall be guilty of illegal employment, and the

person so engaged or employed shall also be guilty of illegal employment if he knew that he was engaged or employed contrary to law.

18. Every bill, placard, or poster having reference to an election shall bear upon the face thereof the name and address of the printer and publisher thereof; and any person printing, publishing, or posting, or causing to be printed, published, or posted, any such bill, placard, or poster as aforesaid which fails to bear upon the face thereof the name and address of the printer and publisher shall, if he is the candidate, or the election agent of the candidate, be guilty of an illegal practice, and if he is not the candidate or the election agent of the candidate, shall be liable on summary conviction to a fine not exceeding one hundred pounds.

19. The provisions of this act prohibiting certain payments and contracts for payments, and the payment of any sum, and the incurring of any expense in excess of a certain maximum, shall not affect the right of the creditor, who, when the contract was made or the expense incurred, was ignorant of the same being in contravention of this act.

20. (a) Any premises on which the sale by wholesale or retail, of any intoxicating liquor is authorized by license (whether the license be for consumption on or off the premises), or

(b) Any premises where any intoxicating liquor is sold, or is supplied to members of a club, society, or association other than a permanent political club, or

(c) Any premises whereon refreshment of any kind, whether food or drink, is ordinarily sold for consumption on the premises, or

(d) The premises of any public elementary school in receipt of an annual parliamentary grant, or any part of such premises, shall not be used as a committee room for the purpose of promoting or procuring the election of a candidate at an election, and if any person hires or uses any such premises or any part thereof for a committee room he shall be guilty of illegal hiring, and the person letting such premises or part, if he knew it was intended to use the same as a committee room, shall also be guilty of illegal hiring.

Provided that nothing in this section shall apply to

any part of such premises which is ordinarily let for the purpose of chambers or offices or the holding of public meetings or of arbitration, if such part has a separate entrance and no direct communication with any part of the premises on which any intoxicating liquor or refreshment is sold or supplied as aforesaid.

21. (1) A person guilty of the offense of illegal payment, employment, or hiring, shall, on summary conviction, be liable to a fine not exceeding one hundred pounds.

(2) A candidate or an election agent of a candidate who is personally guilty of an offense of illegal payment, employment, or hiring, shall be guilty of an illegal practice.

EXCUSE AND EXCEPTION FOR CORRUPT OR ILLEGAL PRACTICE OR ILLEGAL PAYMENT,  
EMPLOYMENT OR HIRING.

22 and 23. Where it appears upon trial that no corrupt or illegal practice was committed by the candidate or his agent, and that such candidate and his agent took all reasonable precautions, and that the offenses were trivial, unimportant and of limited character, and that in all other respects the election was free from any corrupt or illegal practice, or where it is shown to the High Court or any election court by such evidence as seems to the court sufficient—that any act which would be a payment, engagement, employment or contract in contravention of law, or in excess of the maximum limit, arose from inadvertence or from accidental miscalculation, or from some reasonable cause, and in good faith, and under the circumstances it seems to the court to be just that the candidate and his agent should not be subject to the consequences of this act—the court may order that such act or omission be an exception and the person not subject to the consequences.

ELECTION EXPENSES.

24. (1) On or before the day of nomination at an election, a person shall be named by or on behalf of each candidate as his agent for such election (in this act referred to as the election agent).

(2) A candidate may name himself as election agent, and thereupon shall, so far as circumstances admit, be subject to the provisions of this act both as a candidate and as an election agent, and any reference in this act to an election agent shall be construed to refer to the candidate acting in his capacity of election agent.

(3) On or before the day of nomination the name and address of the election agent of each candidate shall be declared in writing by the candidate or some other person on his behalf to the returning officer, and the returning officer shall forthwith give public notice of the name and address of every election agent so declared.

(4) One election agent only shall be appointed for each candidate, but the appointment, whether the election agent appointed be the candidate himself or not, may be revoked, and in the event of such revocation on his death, whether such event be before, during, or after the election, then forthwith another election agent shall be appointed, and his name and address declared in writing to the returning officer, who shall forthwith give public notice of the same.

25. (1) In the case of the elections specified in that behalf in the First Schedule of this act, an election agent of a candidate may appoint the number of deputies therein mentioned (which deputies are in this act referred to as sub-agents), to act within different polling districts.

(2) As regards matters in a polling district the election agent may act by the sub-agent for that district, and anything done for the purposes of this act, by or to the sub-agent in his district, shall be deemed to be done by or to the election agent, and any act or default of a sub-agent which, if he were the election agent, would be an illegal practice or other offense against this act, shall be an illegal practice and offense against this act committed by the sub-agent, and the sub-agent shall be liable to punishment accordingly; and the candidate shall suffer the like incapacity as if the said act or default had been the act or default of the election agent.

(3) One clear day before the polling the election agent shall declare in writing the name and address of every sub-agent to the returning officer, and the returning officer shall forthwith give public notice of the name and address of every sub-agent so declared.

(4) The appointment of a sub-agent shall not be vacated by the election agent who appointed him ceasing to be election agent, but may be revoked by the election agent for the time being of the candidate, and in the event of such revocation or of the death of a sub-agent another sub-agent may be appointed, and his name and address shall be forthwith declared in writing to the returning officer, who shall forthwith give public notice of the same.

26. (1) An election agent at an election for a county or borough shall have within the county or borough, or within any county of a city or town adjoining thereto, and a sub-agent shall have within his district, or within any county of a city or town adjoining thereto, an office or place to which all claims, notices, writs, summons, and documents may be sent, and the address of such office or place shall be declared at the same time as the appointment of said agent to the returning officer, and shall be stated in the public notice of the name of the agent.

(2) Any claim, notice, writ, summons, or document delivered at such office or place and addressed to the election agent or sub-agent, as the case may be, shall be deemed to have been served on him, and every such agent may, in respect of any matter connected with the election in which he is acting, be sued in any court having jurisdiction in the county or borough in which said office or place is situate.

27. (1) The election agent of a candidate by himself or by his sub-agent shall appoint every polling agent, clerk, and messenger employed for payment on behalf of the candidate at an election, and hire every committee room hired on behalf of the candidate.

(2) A contract whereby any expenses are incurred on account of or in respect of the conduct or management of an election shall not be enforceable against a candidate at such election unless made by the candidate himself or by his election agent, either by himself or by his sub-agent; provided that the inability under this section to enforce such contract against the candidate shall not relieve the candidate from the consequences of any corrupt or illegal practice having been committed by his agent.



28. (1) Except as permitted by or in pursuance of this act, no payment and no advance or deposit shall be made by a candidate at an election or by any agent on behalf of the candidate at an election or by any agent on behalf of the candidate or by any other person at any time, whether before, during, or after such election, in respect of any expenses incurred on account of or in respect of the conduct or management of such election, otherwise than by or through the election agent of the candidate, whether acting in person or by a sub-agent; and all money provided by any person other than the candidate for any expenses incurred on account of or in respect of the conduct or management of the election, whether as gift, loan, advance, or deposit, shall be paid to the candidate or his election agent, and not otherwise;

Provided that this section shall not be deemed to apply to a tender of security to or any payment by the returning officer, or to any sum disbursed by any person out of his own money for any small expense legally incurred by himself, if such sum is not repaid to him.

(2) A person who makes any payment, advance, or deposit in contravention of this section, or pays in contravention of this section any money so provided as aforesaid, shall be guilty of an illegal practice.

29. (1) Every payment made by an election agent, whether by himself or a sub-agent, in respect of any expense incurred on account of or in respect of the conduct or management of an election shall, except where less than forty shillings, be vouched for by a bill stating the particulars and by a receipt.

(2) Every claim against a candidate at an election or his election agent in respect of any expenses incurred on account of or in respect of the conduct or management of such election which is not sent in to the election agent within the time limited by this act shall be barred and shall not be paid; and, subject to such exception as may be allowed in pursuance of this act, an election agent who pays a claim in contravention of this enactment shall be guilty of an illegal practice.

(3) Except as by this act permitted, the time limited by this act for sending in claims shall be fourteen days after the day on which the candidates returned are declared elected.

(4) All expenses incurred by or on behalf of a candidate at an election, which are incurred on account of or in respect of the conduct or management of such election, shall be paid within the time limited by this act, and not otherwise; and subject to such exceptions as may be allowed in pursuance of this act, an election agent who makes a payment in contravention of this provision shall be guilty of an illegal practice.

(5) Except as by this act permitted the time limited by this act for the payment of such expenses as aforesaid shall be twenty-eight days after the day on which the candidates returned are declared elected.

(6) Where the election court reports that it has been proved to such court by a candidate that any payment made by an election agent in contravention of this section was made without the sanction or connivance of such candidate, the election of such candidate shall not be void, nor shall he be subject to any incapacity under this act by reason only of such payment having been made in contravention of this section.

(7) If the election agent in case of any claim sent in to him within the time limited by this act disputes it, or refuses to fail to pay it within the said period of twenty-eight days, such claim shall be deemed to be a disputed claim.

(8) The claimant may, if he thinks fit, bring an action for a disputed claim in any competent court; and any sum paid by the candidate or his agent in pursuance of the judgment or order of such court shall be deemed to be paid within the time limited by this act, and to be an exception from the provisions of this act, requiring claims to be paid by the election agent.

(9) On cause shown to the satisfaction of the High Court, such court, on application by the claimant or by the candidate or his election agent, may, by order, give leave for the payment by a candidate or his election agent of a disputed claim, or of a claim for any such expense as aforesaid, although sent in after the time in this section mentioned for sending in claims, or although the same was sent in to the candidate and not to the election agent.

(10) Any sum specified in the order of leave may be paid by the candidate or his election agent, and when

paid in pursuance of such leave shall be deemed to be paid within the time limited by this act.

30. If any action is brought in any competent court to recover a disputed claim against a candidate at an election, or his election agent, in respect of any expenses incurred on account or in respect of the conduct or management of such election, and the defendant admits his liability, but disputes the amount of the claim, the said amount shall, unless the court, on the application of the plaintiff in the action, otherwise directs, be forthwith referred for taxation to the master, official referee, registrar, or other proper officer of the court, and the amount found due on such taxation shall be the amount to be recovered in such action in respect of such claim.

31. (1) The candidate at an election may pay personal expenses incurred by him on account of or in connection with or incidental to such election to an amount not exceeding one hundred pounds, but any further personal expenses so incurred by him shall be paid by his election agent.

(2) The candidate shall send to the election agent within the time limited by this act for sending in claims a written statement of the amount of personal expenses paid as aforesaid by such candidate.

(3) Any person may, if so authorized in writing by the election agent of the candidate, pay any necessary expenses for stationery, postage, telegrams, and other petty expenses, to a total amount not exceeding that named in the authority, but any excess above the total amount so named shall be paid by the election agent.

(4) A statement of the particulars of payments made by any person so authorized shall be sent to the election agent within the time limited by this act for the sending in of claims, and shall be vouched for by a bill containing the receipt of that person.

32. (1) So far as circumstances admit, this act shall apply to a claim for his remuneration by an election agent and to the payment thereof in like manner as if he were any other creditor, and if any difference arises respecting the amount of such claim the claim shall be a disputed claim within the meaning of this act, and be dealt with accordingly.

(2) The account of the charges claimed by the returning officer in the case of a candidate and transmitted in pursuance of section four of the Parliamentary Elections (Returning Officers) Act, 1875, shall be transmitted within the time specified in the said section to the election agent of the candidate, and need not be transmitted to the candidate.

33. (1) Within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall transmit to the returning officer a true return (in this act referred to as a return respecting election expenses) in the form set forth in the Second Schedule of this act or to the like effect, containing, as respects that candidate,—

(a) A statement of all payments made by an election agent, together with all the bills and receipts (which bills and receipts are in this act included in the expression “return respecting election expenses”);

(b) A statement of the amount of personal expenses, if any, paid by the candidate;

(c) A statement of the sums paid to the returning officer for his charges, or, if the amount is in dispute, of the sum claimed and the amount disputed;

(d) A statement of all other disputed claims of which the election agent is aware;

(e) A statement of all unpaid claims, if any, of which the election agent is aware, in respect of which application has been or is about to be made to the High Court;

(f) A statement of all money, securities, and equivalent of money received by the election agent from the candidate or any other person for the purpose of expenses incurred or to be incurred on account of or in respect of the conduct or management of the election, with a statement of the name of every person from whom the same may have been received.

(2) The return so transmitted to the returning officer shall be accompanied by a declaration made by the election agent before a justice of the peace in the form in the Second Schedule of this act (which declaration is in this act referred to as a declaration respecting election expenses).

(3) Where the candidate has named himself as his election agent, a statement of all money, securities, and equivalent of money paid by the candidate shall be substituted in the return required by this section to be transmitted by the election agent for the like statement of money, securities, and equivalent of money received by the election agent from the candidate; and the declaration by an election agent respecting election expenses need not be made, and the declaration by the candidate respecting election expenses shall be modified as specified in the Second Schedule to this act.

(4) At the same time that the agent transmits the said return, or within seven days afterwards, the candidate shall transmit or cause to be transmitted to the returning officer a declaration made by him before a justice of the peace, in the form in the first part of the Second Schedule to this act (which declaration is in this act referred to as a declaration respecting election expenses).

(5) If in the case of an election for any county or borough the said return and declarations are not transmitted before the expiration of the time limited for the purpose, the candidate shall not, after the expiration of such time, sit and vote in the House of Commons as member for the county or borough until either such return and declaration have been transmitted, or until the date of the allowance of such an authorized excuse for the failure to transmit the same, as in this act mentioned, and if he sits or votes in contravention of this enactment he shall forfeit one hundred pounds for every day on which he so sits or votes to any person who sues for the same.

(6) If, without such authorized excuse as in this act mentioned, a candidate or an election agent fails to comply with the requirements of this section he shall be guilty of an illegal practice.

(7) If any candidate or election agent knowingly makes the declaration required by this section falsely, he shall be guilty of an offense, and on conviction thereof on indictment shall be liable to the punishment for willful and corrupt perjury; such offense shall also be deemed to be a corrupt practice within the meaning of this act.

(8) Where the candidate is out of the United King-

dom at the time when the return is so transmitted to the returning officer, the declaration required by this section may be made by him within fourteen days after his return to the United Kingdom, and in that case shall be forthwith transmitted to the returning officer, but the delay hereby authorized in making such declaration shall not exonerate the election agent from complying with the provisions of this act as to the return and declaration respecting election expenses.

(9) Where, after the date at which the return respecting election expenses is transmitted, leave is given by the High Court for any claims to be paid, the candidate or his election agent shall, within seven days after the payment thereof, transmit to the returning officer a return of the sums paid in pursuance of such leave accompanied by a copy of the order of the court giving the leave, and in default he shall be deemed to have failed to comply with the requirements of this section without such authorized excuse as in this act mentioned.

34. (1) Where the return and declarations respecting election expenses of a candidate at an election for a county or borough have not been transmitted as required by this act, or being transmitted contain some error or false statement, then—

(a) If the candidate applies to the High Court or an election court and shows that the failure to transmit such return and declarations, or any of them, or any part thereof, or any error or false statement therein, has arisen by reason of his illness, or of the absence, death, illness, or misconduct of his election agent or sub-agent, or of any clerk or officer of such agent, or by reason of inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, or

(b) If the election agent of the candidate applies to the High Court or an election court and shows that the failure to transmit the return and declarations which he was required to transmit, or any part thereof, or any error or false statement therein, arose by reason of his illness or of the death or illness of any prior election agent of the candidate, or of the absence, death, illness, or misconduct of any sub-agent, clerk, or officer of an election agent of the candidate, or by reason of

inadvertence or of any reasonable cause of a like nature, and not by reason of want of good faith on the part of the applicant, the court may, after such notice of the application in the said county or borough, and on production of such evidence of the grounds stated in the application, and of the good faith of the application, and otherwise, as to the court seems fit, make such order for allowing an authorized excuse for the failure to transmit such return and declaration or for an error or false statement in such return and declaration, as to the court seems just.

(2) Where it appears to the court that any person being or having been election agent or sub-agent has refused or failed to make such return or to supply such particulars as will enable the candidate and his election agent respectively to comply with the provisions of this act as to the return and declaration respecting election expenses, the court, before making an order allowing the excuse as in this section mentioned shall order such person to attend before the court, and on his attendance shall, unless he shows cause to the contrary, order him to make the return and declaration, or to deliver a statement of the particulars required to be contained in the return, as to the courts seem just, and to make or deliver the same within such time and to such person and in such manner as the court may direct, or may order him to be examined with respect to such particulars, and may, in default of compliance with such order, order him to pay a fine not exceeding five hundred pounds.

(3) The order may make allowance conditional upon the making of the return and declaration in a modified form or within an extended time, and upon the compliance with such other terms as to the court seem best calculated to carry into effect the objects of this act; and an order allowing an authorized excuse shall relieve the applicant for the order from any liability or consequences under this act in respect of the matter excused by the court; and where it is proved by the candidate to the court that any act or omission of the election agent in relation to the return and declaration respecting election expenses was without the sanction or connivance of the candidate, and that the candidate took all reasonable means of preventing such act or omission, the court shall

relieve the candidate from the consequences of such act or omission on the part of his election agent.

(4) The date of the order, or if conditions or terms are to be complied with, the date at which the applicant fully complies with them, is referred to in this act as the date of the allowance of the excuse.

35. (1) The returning officer at an election within ten days after he receives from the election agent of a candidate a return respecting election expenses shall publish a summary of the return in not less than two newspapers circulating in the county or borough for which the election was held, accompanied by a notice of the time and place at which the return and declaration (including accompanying documents) can be inspected, and may charge the candidate in respect of such publication, and the amount of such charge shall be the sum allowed by the Parliamentary Elections (Returning Officers) Act, 1875.

(2) The return and declarations (including the accompanying documents) sent to the returning officer by an election agent shall be kept at the office of the returning officer, or some convenient place appointed by him, and shall at all reasonable times during two years next after they are received by the returning officer be open to inspection by any person on payment of a fee of one shilling, and the returning officer shall on demand furnish copies thereof or any part thereof at the price of two-pence for every seventy-two words. After the expiration of the said two years the returning officer may cause the said return and declarations (including the accompanying documents) to be destroyed, or, if the candidate or his election agent so require, shall return the same to the candidate.

#### DISQUALIFICATION OF ELECTORS.

Secs. 36 to 39, inclusive.

#### PROCEEDINGS ON ELECTION PETITION.

Secs. 40 to 44, inclusive.

#### MISCELLANEOUS PROVISIONS.

Secs. 45 to 49, inclusive.



## LEGAL PROCEEDINGS.

Secs. 50 to 58, inclusive.

## SUPPLEMENTARY PROVISIONS, DEFINITIONS, SAVINGS AND REPEAL.

Secs. 59 to 67, inclusive.

## APPLICATION OF ACT TO SCOTLAND.

Sec. 68.

## APPLICATION OF ACT TO IRELAND.

Sec. 69.

## SCHEDULES.

## FIRST SCHEDULE.

## PART I.—PERSONS LEGALLY EMPLOYED FOR PAYMENT.

(1) The election agent and no more.

(2) In counties one deputy agent (in this act referred to as a sub-agent) to act within each polling district, and no more.

(3) One polling agent in each polling station, and no more.

(4) In a borough one clerk and one messenger, or if the number of electors in the borough exceeds five hundred, a number of clerks and messengers not exceeding one clerk and one messenger for every complete five hundred electors in the borough, and if there is a number of electors over and above any complete four hundred or complete five hundreds of electors, then one clerk and one messenger may be appointed for such number, although not a complete five hundred.

(5) In a county for the central committee room one clerk and one messenger, or if the number of electors in the county exceeds five thousand, then a number of clerks and messengers not exceeding in number one clerk and one messenger for every complete five thousand electors in the county; and if there is a number of electors over and above any complete five thousand or complete five thousands of electors, then one clerk and one messenger may be employed for such number, although not amounting to a complete five thousand.

(6) In a county a number of clerks and messengers not exceeding in number one clerk and one messenger for each polling district in the county, or where the number of electors in a polling district exceeds five hundred, one clerk and one messenger for every complete five hundred electors in the polling district, and if there is a number of electors over and above any complete five hundred or complete five hundreds of electors, then one clerk and one messenger may be employed for such number, although not amounting to a complete five hundred; Provided, always, that the number of clerks and messengers so allowed in any county may be employed in any polling district where their services may be required.

(7) Any such paid election agent, sub-agent, polling clerk, clerk, and messenger may or may not be an elector but may not vote.

(8) In the case of the boroughs of East Retford, Shoreham, Cricklade, Muchwenlock, and Aylesbury, the provisions of this part of this schedule shall apply as if such borough were a county.

## PART II.—LEGAL EXPENSES IN ADDITION TO EXPENSES UNDER PART I.

(1) Sums paid to the returning officer for his charges not exceeding the amount authorized by the act. 38 and 39 Vict., ch. 84.

(2) The personal expenses of the candidate.

(3) The expenses of printing, the expenses of advertising, and the expenses of publishing, issuing, and distributing addresses and notices.

(4) The expenses of stationery, messages, postage, and telegrams.

(5) The expenses of holding public meetings.

(6) In a borough the expenses of one committee room and if the number of electors in the borough exceeds five hundred, then of a number of committee rooms not exceeding the number of one committee room for every complete five hundred electors in the borough.

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(7) In a county the expenses of a central committee room, and in addition of a number of committee rooms not exceeding in number one committee room for each polling district in the county, and where the number of electors in a polling district exceeds five hundred, one additional committee room may be hired for every complete five hundred electors in such polling place over and above the first five hundred.

PART III.—MAXIMUM OF MISCELLANEOUS MATTERS.

PART IV.—MAXIMUM SCALE.

PART V.—GENERAL PROVISIONS.

## SECOND SCHEDULE.

PART I.—FORM OF DECLARATIONS AS TO EXPENSES.

- (1) Form for candidate.
  - (2) Form for election agent.
  - (3) Form for return of election expenses.
    - (a) Receipts.
    - (b) Expenditures.
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CORRUPT PRACTICE ACT OF MASSACHUSETTS, 1892.—(Taken from Supplement to the Public Statutes, 1889-1895.)

## ELECTION EXPENSES.

Section 1. No person shall, in order to aid or promote his own nomination as a candidate for public office, by a caucus, convention or nomination paper, directly or indirectly, by himself or through another person, or by a political committee, give, pay, expend, or contribute, or promise to give, pay, expend, or contribute, any money or other valuable thing, except for personal expenses, as hereinafter provided.

Section 2. No person shall, in order to aid or promote his own nomination or election to a public office, directly or indirectly, by himself or through another person, promise to appoint, or promise to secure or assist to secure the appointment, nomination or election of another person to a public position or to a position of honor, trust or emolument, except that he may announce or define his own choice or purpose in relation to an election in which he may be called to take part, if he shall himself be elected to the public office for which he is a candidate.

• Section 3. No person shall, in order to aid or promote his own election to a public office, directly or indirectly, by himself or through another person, give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or valuable thing, except as hereinafter provided, for personal expenses and to a political committee.

Section 4. A candidate for nomination or election to a public office, and any other person, may incur and pay, in connection with such nomination or election, his own personal expenses for traveling and purposes properly incidental to traveling; for writing, printing and preparing for transmission any letter, circular or other publication which is not issued at regular intervals, whereby he make known his own proposition or views upon public or other questions; for stationery and postage, for telegraph, telephone and other public messenger service, and for other petty personal purposes; but all such expenses shall be limited to those which are directly incurred and paid by him; and no person shall be required to include such personal expenses in any statement which may be required of him under this act.

Section 5. A person who is nominated as a candidate for public office, by caucus, convention or nomination papers, and any person who shall with his own consent be voted for public office, may make a voluntary payment of money or a voluntary and unconditional promise of payment of money to a political committee as hereinafter defined for the promotion of the principles of the party which the committee represents, and for the general purposes of the committee.

Section 6. The term "political committee," under the provisions of this act, shall apply to every committee or combination of three or more persons who shall aid or promote the successive defeat of a political party or principle in a public election, or shall aid or take part in, the nomination, election or defeat of a candidate for public office. Every such committee shall have a treasurer, who is a legal voter of the commonwealth, and shall cause to be kept by him detailed accounts of all money, and the equivalent of money, which shall be received by or promised to the committee, or any person acting under its authority or in its behalf, and of all expenditures, disbursements and promises of payment or disbursements which shall be made by the committee or any person acting under the authority or in its behalf; and no person, acting under the authority or in behalf of such committee, shall receive any money, or equivalent of money, or expend or disburse the same, until the committee has chosen a treasurer to keep its accounts as herein provided.

Section 7. A person who, acting under the authority or in behalf of a political committee, shall receive any money or equivalent of money or promise of the same, or shall expend any money or its equivalent, or shall incur any liability to pay any money or its equivalent, shall at any time thereafter, on demand of the treasurer of such committee, and in any event within fourteen days after such receipt, expenditure, promise or liability, give to such treasurer a detailed account of the same, with all vouchers required by this act; and such account shall constitute a part of the accounts and records of such treasurer.

Section 8. The treasurer of every political committee which shall receive or expend or disburse any money, or equivalent of money, or incur any liability to pay money, in connection with any election, if the aggregate of such receipts or of such expenditures, disbursements, and liabilities shall exceed twenty dollars, shall, within thirty days after such election, file a statement setting forth all receipts, expenditures, disbursements and liabilities of the committee and of every officer and other person acting under its authority and its behalf. Such statement shall include the amount in each case received, the name

of the person or committee from whom it was received, and so far as practicable, the date of its receipt, and shall also include the amount of every expenditure or disbursement, the name of the person or committee to whom the expenditure or disbursement was made, and, so far as practicable, the date of every such expenditure or disbursement; and, except where such expenditure or disbursement was made to another political committee, shall clearly state the purposes for which it was expended or disbursed. The statement shall also give the date and amount of every existing promise or liability, both to and from such committee, remaining unfulfilled and in force at the time the statement is made, with the name of the person or committee to or from whom the unfulfilled promise or liability exists, and clearly state the purpose for which the promise or liability was made or incurred.

Section 9. Every person who, acting otherwise than under the authority and in behalf of a political committee having a treasurer as hereinbefore provided, receives money, or the equivalent of money, or expends or disburses, or promises to expend or disburse money or its equivalent, to an amount exceeding twenty dollars, for the purpose of aiding or promoting the success or defeat of a political party or principle, in a public election, or of aiding or taking part in the nomination, election or defeat of a candidate for public office, shall file such statement as is herein required to be filed by a treasurer of a political committee, in the town or city in which he is a legal voter, and shall be subject to all of the requirements of this act, the same as a political committee and the treasurer thereof; but no person other than a legal voter of the commonwealth shall receive, expend or disburse any money or equivalent of money, or promise to expend or disburse the same for either of the purposes above named, except for personal expenses, as herein provided, or under the authority and in behalf (of) a political committee.

Section 10. No person shall, directly or indirectly, by himself or through another person, make a payment or promise of payment to a political committee or to an officer or other person acting under its authority or in its behalf, in any other than his own name; nor shall such committee, officer or other person knowingly re-

ceive a payment or promise of payment, or enter or cause the same to be entered, in the accounts or records of such committee, in any other name than that of the person by whom such payment or promise is made.

Section 11. No political committee, and no person acting under the authority or in behalf of a political committee, shall demand, solicit, ask or invite a payment of money or promise of payment of money to be used in an election, from a person who has been nominated by a caucus, convention or nomination paper, as a candidate for public office in such election; and no person so nominated shall make any such payment in an election in which he is a candidate for public office, to a political committee or to any person acting under the authority or in behalf of a political committee, if such committee or any such person has demanded, solicited, asked or invited from him any such payment or promise of payment.

Section 12. The statement required by this act to be filed by a treasurer of a political committee shall be filed with the clerk of the city or town in which the treasurer as a legal voter, except that, in case a political committee has its headquarters in some other city or town than that in which the treasurer is a legal voter, the treasurer shall file the statement required of him with the clerk of the city or town in which such headquarters are maintained at the time of the election to which the statement relates. A statement relating to any other than a city election, or than an election on the part of a city council or of either branch thereof, shall be filed in duplicate, and one copy shall be forthwith forwarded by the city or town clerk receiving the same to the secretary of the commonwealth, by whom it shall be placed on file. Every person making a statement required by the provisions of this title shall make oath that the same is in all respects correct and true to the best of his knowledge and belief.

Section 239. The supreme judicial court and the superior court shall have full equity powers to compel any person who fails to file a statement required by this act, or who files a statement which does not conform to the provisions of this act in respect to the truth, sufficiency in detail, or otherwise, to comply with the provisions of

this act by filing such statement as is required, and may compel such compliance upon petition of any candidate voted for or of any five persons qualified to vote at the election on account of which the expenditures, or any part thereof, were made or are alleged to have been made. No such petition shall be brought later than sixty days after such election, against any one who has filed his account within the thirty days required, except that a petition may be brought within thirty days of any payment which was now included in the statement so filed. Proceedings under this section shall be advanced upon the dockets of said courts, if requested by either party, so that they may be tried and decided with as little delay as possible. No petition brought under this title shall be withdrawn or discontinued without the consent of the attorney-general.

Section 240. No person called to testify in any proceedings under the preceding section shall be liable to criminal prosecution under this act, or otherwise, for any matters or caucus in respect of which he shall be examined, or to which his testimony shall relate, except to prosecution for perjury committed in such testimony.

Section 241. If any statements which are filed under the provisions of this title shall apparently fail to be in conformity with the requirements thereof, it shall be the duty of the clerk, with whom any such statement is filed, forthwith to notify the person making the same, of such failure, and to request him to amend and correct his statement.

Section 242. All statements which are filed in accordance with the provisions of this title shall be preserved for not less than fifteen months from the time of the election to which they relate, and shall during such period be open to public inspection, under reasonable regulations.

Section 243. A clerk of a town or city shall give a receipt for any statement which may be filed with him in accordance with the provisions of this title, at the request of the person filing the same.

Section 244. Every payment in respect of any expense incurred which is to be accounted for under this act shall, unless the total expense payable to such per-



son is less than five dollars, be vouched for by a receipted bill stating the particulars of expense, and every voucher, receipt or account hereby required shall be preserved at least six months from the election to which they relate.

Section 245. The secretary of the commonwealth shall, at the expense of the commonwealth, provide every city and town with blank forms suitable for such statements and receipts for statements as are required under the provisions of this act. Such blank forms shall be approved by the secretary, treasurer and auditor of the commonwealth, or a majority of them.

Section 246. This act shall apply to all public-elections except elections of town officers in towns, and shall apply to elections by the general court (legislature) and by city councils, and by either branch thereof, to caucuses and conventions for the nomination of candidates to be voted for at such elections, and to nomination papers for the nomination of candidates to be, except that sections one, three, and ten of this act shall not apply to the proprietors and publishers of publications issued at the regular intervals, in respect of the ordinary and regular conduct of their business as such proprietors and publishers.

Section 344. Whoever violates any of the provisions of sections one, two, three, six, seven, eleven, twelve, sixteen, seventeen, and twenty of this act shall be punished by fine not exceeding one thousand dollars. Whoever shall violate any of the provisions of sections eight, nine, and ten of this act, shall be punished by fine not exceeding one thousand dollars, or by imprisonment in jail for not more than one year, or by both such fine and imprisonment.

# APPENDIX.

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## II.

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### THE TRAMWAYS ACT OF 1870.

33 Vict., ch. 78.

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Sec. 4. Provisional orders authorizing the construction of tramways in any district may be obtained by—

(1) The local authorities of such district; or by

(2) Any person, persons, corporation, or company, with the consent of the local authorities of such district; or of the road authority of such district, where such district is or forms part of a highway district formed under the provisions of "The Highway Acts."

\* \* \* \* \*

Sec. 43. Where the promoters of a tramway in any district are not the local authority, the local authority, if, by resolution passed at a special meeting of the members constituting such local authority, they so decide, may, within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway, and within six months after the expiration of every subsequent period of seven years, or within three months after any other order made by the Board of Trade under either of the two next preceding sections, with the approval of the Board of Trade, by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatever) of the tram-

way, and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purpose of their undertaking within such district, such value to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs; and when any such sale has been made, all the right, powers, and authorities of such promoters in respect to the undertaking sold, or where any order has been made by the Board of Trade under either of the next preceding sections, all the rights, powers, and authorities of such promoters previous to the making of such order in respect of the undertaking sold, shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold, in like manner as if such tramway was constructed by such authority and under the powers conferred upon them by a provisional order under this act, and in reference to the same they shall be deemed to be the promoters.

LAWS WIS. 1897, CH. 370.

AN ACT REGULATING THE GRANTING OF FRANCHISES IN VILLAGES AND CITIES.

Section 1. No grant shall be made by any village or city, which shall be governed by the provisions of this act, to any person, persons, or corporations of a right or franchise to establish, maintain or operate a street railway system, gas or electric plant, water-works or telephone system, or any other franchise for carrying on business within such village or city where the use of the streets or alleys of such village or city is granted in the franchise except as herein provided.

Section 2. Prior to the granting of any such franchise, the village board or city council shall cause to be prepared full specifications containing the rules and regulations for the maintenance and operation of the plant, and for the conduct of the business for which such franchise is to be granted. Said specifications shall contain a maximum rate which may be charged to patrons or consumers under said franchise, and shall provide for

annual statements sworn to by the managers and the treasurer of the company operating under said franchise, of the gross receipts for such business carried on under such franchise, to be made to the board of trustees or common council of such village or city, except that statements of gross receipts need not be made when the franchise is granted, as provided for in section 4 of this act; and provided further that the terms of all franchises granted hereunder, shall be unalterable by the common council or village board without the consent of the grantees thereunder.

Section 3. The village board, or common council, shall advertise for bids for such franchise for at least three weeks in at least three papers of general circulation, printed in the English language, one paper to be the official paper, if any, of such village or city, one paper to be published in the largest city in the state, and one to be a trade paper devoted to the business to be carried on under such franchise. Such advertisements shall refer to the specifications, and shall request proposals to be submitted, stating what percentage of the gross receipts from the business carried on under the franchise the bidder will pay annually into the treasury of such village or city in consideration of the receiving of such franchise. All bids must be made in conformity with such advertisement or specifications. The village board and common council may reject any and all bids, but no bid shall be accepted unless it is the highest, and no franchise shall be granted except to the person or corporation offering to pay into the treasury of the village or city the highest percentage on the gross receipts from the business carried on under such franchise; provided, the bond of such person or corporation is satisfactory.

Section 4. In case the franchise to be granted is an extension of a plant already in operation, under a franchise already granted, then the bids may be made in stated sums of money to be paid annually into the treasury of the village or city granting such franchise in lieu of the percentage of the gross receipt.

Section 5. Such specifications shall also provide that a certified check of an amount specified shall accompany each bid as a guarantee of the acceptance of the franchise, if granted, and the giving of the bond provided for,

and shall provide for the giving of a bond, satisfactory to such village board or city council in a specified sum by the bidder in case such bid is accepted, conditioned upon the construction, equipment and operation of the plant within a specified time after the acceptance of such a bid; provided, however, that actual work of construction, under any franchise granted hereunder shall commence and continue in good faith within one year after granting the same; and in default thereof all rights granted under such franchise shall be void and of no effect.

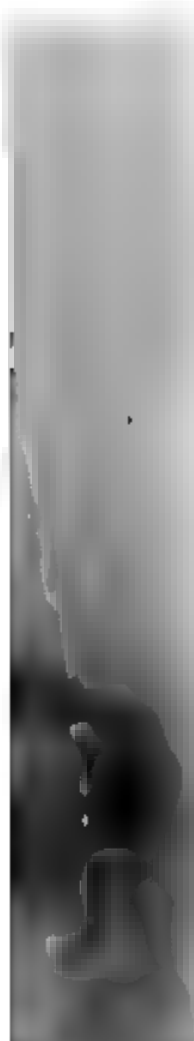
Section 6. The acceptance of such bid and granting of such franchise shall be by resolution or ordinance of the village board or common council.

Section 7. Upon the passage of such resolution or ordinance, all the terms, conditions, rules, and regulations contained in said specifications shall be and become a part of the terms and conditions of the purchase thereby granted, and any willful failure to comply with such specifications shall, at the option of the village board or common council, be held to wholly invalidate such franchise and annul and work a forfeiture of all rights granted thereunder.

Section 8. This act shall apply to and be in force in all cities and villages which shall so determine, in the manner following: If a petition signed by ten per cent of the duly qualified electors of any city or village, according to the next previous poll list thereof, be filed with the clerk of such city or village, twenty days before any municipal or general election therein, praying that the question of selling franchises under the provisions of this act be submitted to a vote of the people, such clerk shall print in the official ballot to be used at such election the question: "Shall this city or village adopt the provisions of chapter —, of the laws of 1897, regulating the selling of franchises?" the answer of the electors to be "yes or no," written in the space provided therefor in the ballot. If a majority of the electors voting on such question vote "yes," then all franchises thereafter granted by such city or village shall be sold as provided in this act. The operation of this act may be revoked by a vote of the people taken in the same manner as above provided.

## LAWS OF WIS. 1897, CH. 361.

Section 5. Whenever an application shall be made to any common council of any city or to the board of trustees of any village, for a franchise to construct and operate a system of water-works, or of lighting in such city or village, such common council or board of trustees may in its discretion submit such application to the electors of such city or village at a special election to be called for that purpose, and such common council or board of trustees shall so submit such application to the electors of such city or village if, at or before the expiration of the publication of such franchise as required by chapter 148, of the laws of 1893, a petition requiring such submission signed by at least twenty per cent of the electors of such city or village, as appears by the poll list of the last general election, shall be presented to such common council or board of trustees. The notice of such election shall be given by the clerk of such city or village for the time, and as required in the case of charter elections in such city or village. \* \* \* If a majority of the ballots cast at such election shall be in favor of granting such franchise, the same shall be granted by the common council or board of trustees. If a majority of the ballots so cast shall be against granting such franchise, such franchise shall not be granted by such common council or board of trustees. No part of this act shall apply to the cities of the first class, or towns containing an unincorporated village.



# APPENDIX.

## III.

### A PLAN PROPOSED FOR THE NOMINATION OF PARTY CANDIDATES AND FOR SETTLING PARTY ISSUES BY CONVENTION.

The primary election is not always practical. It will not always serve the political ends of the people. In nominations for state and national elections, for example, the constituencies are usually too large to allow of its use. For these, conventions are found necessary. They are necessary not only for the nomination of party candidates, but also for the formulation of party issues. The convention system in its present form, however, is subject to so many abuses and is so often controlled by a political machine that it is not well adapted to government of the people, by the people and for the people. In order to adapt the convention system to this end, modification is necessary. The following plan is here proposed:—<sup>1</sup>

(1) That delegates be chosen from the various precincts by primary election, as at present, a "limited ballot" being employed;<sup>2</sup>

(2) That the delegates thus elected, at a time specified, meet in convention according to the system now in vogue.

(3) That at this convention the following proceedings be had:

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<sup>1</sup> A very similar suggestion may be found in *Public Opinion*, May 7, 1896, p. 589.

<sup>2</sup> For example, if a precinct be entitled to four delegates, to allow each elector to cast one vote for each of two, the four receiving the largest number of votes to be the delegates elected. By this means, in case there were a "ring" it could not elect more than one-half of the delegation.



First, That the party issues be framed, and if there be any questions of difference that majority and minority reports be made.

Second, That for each office to be filled at the election, the names of the prominent men of the party be balloted on till one shall have received a majority vote; and when a majority vote shall have been cast for anyone that that one and the one who shall have received the next highest vote on the same ballot shall be declared to be the candidates of the convention for nomination by the party.

Third, That names be balloted on for each office successively till a double list of convention candidates shall have been chosen throughout.

(4) That thereafter, at some time specified, the majority and minority reports on issues and the double list of convention candidates be submitted to the electors of the party and those issues and those candidates receiving a majority vote shall be the issues and the candidates of the party in the ensuing election.

In case it is desirable to settle party issues and nominate party candidates for county and state (or county, state and nation), by the convention method, this process might be extended in each successive convention without change till the broadest political unit had been reached. For example, if it be a year of presidential election, the county convention, held in the manner above set forth, might, by the use of the limited ballot, choose delegates to a state convention; then state issues might be framed, a double list of convention candidates chosen and delegates elected to the national convention. At the national convention issues might be framed and a double list of convention candidates chosen. Then on a certain day, giving sufficient time for the people to consider and discuss issues and convention candidates, the majority and minority reports, national, state, and county, and the double list of convention candidates (national, state, and county), might be submitted to the electors of the party, and those issues and those convention candidates having a majority vote be declared the issues and candidates of the party. By requiring that only such convention candidates as shall have been selected in this

manner shall be entitled to have their names placed on the official ballot, the adoption of the plan would be secured.<sup>1</sup>

This plan is suggested for the reasons following:

(1) Because it would insure a majority expression upon and the people would virtually frame the issues and platform of the party.

(2) Because it would insure a majority expression upon, and the electors would virtually make, the party nominations instead of having to submit to the choice of a "ring."

(3) Because the only extra effort on the part of the people would be that of attending one primary; and in this to choose between two candidates for each office so that the personal interest would be large and a large attendance at the election insured.

(4) Because it would be the most simple way that can be devised for obtaining a majority expression of the electors.

<sup>1</sup> The ballot for this referendal primary would be something like the following:

County Candidates and Issues.	State Candidates and Issues.	National Candidates and Issues.
Issues.	Issues.	Issues.
*  Majority Report.   Minority Report.	*  Majority Report.   Minority Report.	*  Majority Report.   Minority Report.
Candidates.	Candidates.	Candidates.
* A. } County  B. } Commissioner	* K..... } Governor.  L..... }	* W..... } President.  Y..... }
* C.... } Treasurer.  D.... }	* M. } Lt. Governor.  N. }	
* E..... } Clerk.  F..... }	* O..... } Treasurer.  P..... }	
* G..... } Sheriff.  H..... }	* Q. } Sec'y of State.  R. }	
* I..... } Auditor.  J..... }	* S..... } Auditor.  T..... }	

(The \* indicates the candidates and issues voted for.)

(5) Because it would be a difficult plan for the politician to "work."<sup>2</sup>

(6) Because by providing a method whereby the office, or the people, would seek the man, there is reason to hope that it would so discredit office-seeking, that the citizen could hope to win honorable position and recognition on the part of his countrymen only by honorable conduct and patriotic service instead of by collusion and corrupt practices.

(7) Because politics would be made honorable by making a political campaign a movement of the people instead of a scramble by placement; and in case the "ring" politician managed to work through the nominating system, if all parties employed such a method, he could be summarily "killed" at the election.

(8) Because such a system would not be an innovation in principle, but only a step in advance of methods already in vogue; in fact a combination of the convention system and the Crawford county system. It would be thoroughly understood.

(9) Because it could be put into force without the expense and delay of changing our constitutions.

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<sup>2</sup> The only acts required on the part of the people would be the choice of delegates and the ballots on issues and candidates. The "machine," on the other hand, in order to capture the nomination, would be required (1) to secure a majority of the delegates in the primary election, and (2) get control of the convention. (3) Secure a majority of the electors of the party. (4) Having secured a majority of the party, it must then be able to secure a majority of the constituency in the district, state or nation, as against the nominee of the opposing party. This method, though very simple for the people, would be very discouraging for the politician.

# APPENDIX.

## IV.

### STATISTICS CONCERNING CAPITAL AND LABOR, DEBTOR AND CREDITOR, AND TAXATION.

Showing the wages of artificers, laborers and servants as fixed by the justices of the peace at Chelmsford, in the county of Essex, on the 8th day of April, 1651, "according to the true meaning of the statute made in the twenty-ninth year of the reign of Queen Elizabeth, having a special regard and consideration to the price at this time of all kinds of victuals and apparel," etc.

Occupations.	By the day from March to Sept.		By the day from Sept. to March.		By the whole Year.		
	With board.	Without board.	With board.	Without board.	Wages.		
	d.	d.	d.	d.	£	s.	d.
A master mason.....	12	18	10	16	4	0	0
A master rough mason.	10	17	8	14	3	0	0
A master mason's serv- ants and apprentices..	4	10	3	7	1	10	0
A master carpenter.....	12	18	10	16	4	0	0
A master carpenter jour- neyman and servants.	8	14	6	12	2	10	0
A master carpenter, servants and appren- tices .....	6	12	6	10	1	4	0
A master sawyer.....	10	16	8	14	4	10	0
A master sawyer's la- borer ..	8	0	8	12	4	0	0
Palers .....	8	0	8	12	4	0	0
Rivers of pale, clapboard and laths .....	10	18	8	16	4	0	0
A millwright .....	12	18	10	16	0	0	0
A plowwright and cart- wright .....	10	18	8	16	0	0	0

Occupations.	By the day from March to Sept.		By the day from Sept. to March.		By the whole Year.		
	With board.	Without board.	With board.	Without board.	Wages.		Livery.
	d.	d.	d.	d.	£	s. d.	s. d.
Coopers .....	10	16	6	14	0	0 0	0 0
A master shipwright...	16	24	12	16	0	0 0	0 0
A hewer or common shipwright .....	10	18	8	14	0	0 0	0 0
An able clencher.....	10	18	8	14	0	0 0	0 0
An able holder.....	8	14	7	12	0	0 0	0 0
A master calker.....	14	24	10	16	0	0 0	0 0
A calker laboring by tide .....	10	18	8	14	0	0 0	0 0
A common calker.....	9	16	8	14	0	0 0	0 0
A master joiner or carver.....	10	18	8	16	4	0 0	10 0
A master joiner or carver's servants and apprentices .....	8	14	6	12	3	10 0	10 0
A master bricklayer, tiler, plasterer and shingler .....	6	9	5	8	1	13 4	6 0
Second bricklayers,tilers and slaters, 16 to 24 years old .....	10	18	8	16	4	0 0	10 0
Their servants and ap- prentices, 12 to 24 years old .....	8	16	6	14	2	0 0	10 0
Brick and tile makers, burners of wood,ashes and lime .....	6	10	5	8	0	0 0	0 0
Their servants and ap- prentices .....	8	16	6	12	3	0 0	10 0
Master thatchers .....	6	11	5	10	2	10 0	10 0

Tables showing wages of artificers, laborers, servants, etc., during the period as fixed by law and the justices.

Wages of servants, laborers and artificers as fixed by the justices of the peace at Okeham, in the county of Rutland on the 28th day of April, 1610.	See "Labor in Europe and America," by Young, p. 150.
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	Wages per annum.		
	£	s.	d.
A bailiff of husbandry, having charge of a plow land at least.....	2	12	0
A man servant of husbandry of the best sort, who can sow, mow, thresh, make a rick, thatch and hedge the same and kill a hog, sheep or calf .....	2	10	0
A servant who can drive, plow, pitch, cart and thresh, but cannot pertly sow and mow.....	1	9	0
A boy under sixteen years of age.....	1	0	0
Wages of Women Servants			
A chief woman servant who can bake, brew, make malt and oversee other servants.....	1	6	8
A girl under sixteen years of age.....	0	14	0
Wages of Millers.			
A chief miller who can pertly beat, lay, grind and govern his mill.....	2	6	0
A common miller.....	1	11	8

Wages of artificers and their apprentices (see above).	From Easter to Michaelmas.	From Michaelmas to Easter.
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Occupation.	With Meat.	Without Meat.	With Meat.	Without Meat.
	d.	d.	d.	d.
Chief joiner, per day.....	6	12	4	8
Joiner's apprentice, per day..	4	8	3	6
Master sawyer, per day.....	6	12	4	8
Plowwright, per day.....	5	10	4	8
Thatcher, per day.....	5	9	4	8
Hurdle maker, per day.....	5	9	4	8
Horse collar maker, per day..	6	10	4	8
Master mason, per day.....	8	12	6	10
Rough mason, per day.....	5	10	4	8
Master carpenter, per day....	8	14	6	14
Expert carpenter, per day....	5	10	4	8
Carpenter's apprentice, per day .....	3	7	2	6
Bricklayer, per day.....	5	9	4	8
Bricklayer's apprentice, per day .....	3	7	2	6

## LAWS ENACTED FOR THE

	Convict Labor Laws.				Alien Con- tract Laws.	Anti-Chi- nese Laws.
	No Contract	Only Within Walls.	Not to Compete.	Goods must be marked.		
1 Ala.						
2 Ariz.		RS. 87 § 2424				
3 Cal.	Con. I. 6.					Cons. XII § 3.*
4 Colo.	L. 89 p. 91.	* L. 89 ch. 32 § 1.	L. 87 p. 332 *			
5 Conn.						
6 Del.		Co. 74 ch. 133 § 6				
7 D.C.	RS. D.C. ch. 35					
8 Fla.						
9 Ga.						
10 Ida.		* Cons. XIII § 3 †			Cons. XIII § 5.	L. 91 p. 233.
11 Ill.		Am. St. 83 ch. 108 § 4			L. 89 p. 2.	
12 Ind.		L. 80		L. 95 ch. 162.	L. 11 Sup. ch. 74 § 38	
13 Ia.	MS. 84 § 473	L. 80 ch. 149 § 1 *				
14 Kan.		St. 85 § 3688.				
15 La.		Voor. L. 70 § 2855				
16 Me.			L. 87 ch. 149 § 3	L. 87 ch. 149 § 4		
17 Mass.	L. 87 ch. 447 § 1				* Pub. St. 82 ch. 86 § 2	
18 Mich.			Cons. I. 38			
19 Minn.		L. 89 ch. 255				
20 Mo.		* RS. 89 ch. 126 § 723				
21 Miss.		L. 80 ch. 40 § 9.				
22 Mont.	Cons. XVIII. 2.					
23 Nev.						
24 N. H.						† Gen. St. ch. 28 § 10
25 N. J.	* RS. Sup. 86 p. 969			L. 87 ch. 176 § 1.		
26 N. Y.	RS. 81 p. 261 § 55			* L. 87 ch. 32 § 2		
27 N. D.		RS. 83 ch. 13 p. 2 *				† L. 89 ch. 46 § 1.
28 O.		* RS. § III p. 769 *		L. 88 p. 92 § 1, 2, 3.		
29 Ore.		* Am. St. 87 ch. 65				* Am. St. 87 ch. 82.
30 Penn.	L. 97 ch. 30 § 11.			Dig. 85 p. 1314 § 17		
31 R. I.						
32 S. D.						
33 Tex.		* L. 85 ch. 95 L. 83 ch. 4				
34 Ver.						
35 Va.					† Cod. 87 ch. 6 § 44	
36 Wash.	Cons. II. 29.					
37 Wis.		RS. 78 Sup. 83 § 2				
38 Wyo.		RS. 87 § 3373-4				
39 U.S.	Act. 867 ch. 213				Act. 84 ch. 169 § 80	Act. 87 ch. 101 § 1
	* The piece system. † Also L. 84 ch. 21 * L. 89 ch. 382. Cons. II. 29.	* May be em- ployed out- side on State works † Also RS. 87 p. c. § 8500-1 * L. 89 § 4	* Also L. 89 p. 427	* Also L. 87 p. 472	* Must give bond not to become public charge. † Shall not exceed two yrs.	* Also Derrin Code Vol. 1 p. 178. † Also ch. 23 § 4949 † Statistics on * Act. 84 ch. 109 in Portland & other ports 385

## PROTECTION OF LABOR

[illegible]



Laws Providing for the Health of Employees.						
States	Seats for Female Employees	Seats for Street-car Conductors	Regulations for Parturient	Requiring meal times for Women & Children	Underground Employment Children.	Hospitals
Ala.	1889 Act 92 § 1				1887 Act 40 § 1	
Ark.						
Cal.			1889 ch 3			*
Colo.	1885, 297 § 12		1887 p 62 § 19		* 1885, 76 § 1	
Conn.			Gen St 88 ch 143			
Del.	1887 ch 239 § 12					
Ga.	1890 Act 60 § 1					
Ida.					* Cons Art 3 § 4	
Ill.			Ann 1885 ch 79 § 1		* Ann Gr 85 ch 93	
Ind.			Ell Sup 83 ch 37		* Ell Sup 85 ch 112	
Ia.			1884 ch 32 § 3		* 1884 ch 21 § 13	
Kan.					* 1885 § 3473	
La.	1886 Act 13 § 1		1890 Act 123			
Mass.	1888 Act 338 § 1		1888 ch 275 § 1			
Mich.	1885 Act 39 § 3		1889 ch 265 § 6	1887 ch 280 *		
Minn.	1885 ch 10 § 12		1887 ch 115			
Mo.	1889 ch 47 § 3700		R S 89 ch 182		* R S 89 § 7066	
Mont.					* 1889 Act 60 § 11	
Neb.	1887 Act 235 § 1		1887 ch 396 § 4		1887 ch 235 § 1	
N.H.				1882 ch 25 § 14		
N.J.	1886 Act 50 § 17	1886 Act 37 § 35	1887 ch 127		* 1886 Act 40 § 1	
N.Y.	1881 Act 109 § 12		1886 ch 489 § 13			
N.D.			1890 ch 46 § 149		* Cons Art 17 § 209	
O.	1885 Act 65 § 1		1889 Act 14 § 3		* R S Act 3302 *	
Penn.	1887 Act 61 § 2		1889 ch 236	1889 Act 235 § 1	* 1885 ch 170 Act 11	*
S.C.					* 1890 ch 112 § 11	
Wash.	1890 Act 9 § 12		Cons Art II § 35		* 1887 Act 21 § 6	
W. Va.			1889 ch 15 § 4		* Code 1879 § 973 § 13	
Wis.			* R S Sup 83 ch 46			
Wyo.					* Cons Art II § 3	
Utah						
U.S.					* 1896 ch 56 § 12	
			* 1887 ch. 589 § 1 * 1887 Act 187 ch 488 Act 188 ch 398	* 1885 ch 215	* Unlawful under 18 yrs + " 18- + " 14- On 4 mos per year allowed + 1885 Act 188 p 328	* For Miners

## LAWS PROVIDING FOR THE SAFETY OF EMPLOYEES.

	Inspection of Mines.	Safety Apparatus for Mines.	Penning Shafts.	Inspection Boilers.	Inspection Factories.	Safety Appliances on Railroads.	Pipe in Escapes Factories.	Pipe in Escapes Mines.	Control of Factory Gensets.	Blowers on Emergency Wheels.	Guards on Saws.	Guards on Machinery.
Ala.												
Ark.												
Cal.	*	*		*								
Colo.	*	*	*	*				*				
Conn.					*	*	*	*				
Del.							*	*				
D.C.							*					
Ga.							*					
Ida.												
Ill.	*	*		*		*	*	*				
Ind.	*	*	*	*								
Ia.	*	*		*		*						
Kan.	*	*	*	*								
Ky.	*	*		*								
La.					*		*					
Me.					*		*					
Mass.	*	*		*								
Mich.					*	*	*		*	*		
Minn.					*		*	*				
Mo.	*		*		*		*					
Mont.	*	*										
Neb.					*		*	*				
Nev.												
N.H.							*	*				
N.J.					*		*	*				
N.M.	*			*								
N.Y.	*				*	*	*					
N.D.							*					
Q.	*	*		*	*		*					
Penn.	*	*	*	*	*		*	*				
R.I.							*					
S.D.	*						*					
Tenn.	*			*	*							
Utah			*									
Va.							*					
Wash.	*	*	*	*	*							
W.Va.	*	*		*	*							
Wis.							*	*				
Wyo.	*	*		*	*							
U.S.	*	*		*								

Key: \* Indicates "required"; † "inspection provided."

## HOMESTEAD EXEMPTIONS.

States.	Country Property			City Property			Lieu Exemptions
	acres	value	References	Property	value	References	
Ala.	Cons. 80a Stat. 160a	\$2000. 2000.	Cons. X, 2. Cod. 86 V. 11 § 2507 *	any lot with dwelling	\$2000.	same	
Ariz.		4000.	R.S. 87. § 2701				other land necessary for business
Ark.	Cons. 160a Stat. 160a	2500. 2500.	Cons. IX, 3, 4. Dig. 84. § 2995†	not to exceed one acre	\$2500 2500	Cons. IX 5. same § 2996	
Cal.	All used as a homestead		Cons. XVII, 1. Decr. 60. 61 § 1240	Same as country			
Colo.	no limitation	\$2000.	Cons. XVIII, 1. Gen. St. 83. § 1631.	"	"	"	
Conn.	no limitation	1000.	Gen. St. 88 § 2783.	"	"	"	
Fla.	Cons. 160a Stat. 160a		Cons. X, 1. Fla. St. ch. 104 § 1.	1/2 acre		same	
Ga.	50a. + 5a for each member.	1600.	Cons. IX. L 87 p 43.		\$500	L 87. p 43.	
Ida.	\$8000 and \$1000 for each additional member.		RS. 7-11 § 3053.	Same as country			
Ill.	no limitation	\$1000.	Cons. IV, 35. Ann. St. 85 ch 52 § 16.	"	"	"	
Ia.	All used as such but Subject to Contracts		McC. St. 84 § 1988.				
Kan.	Cons. 160a. Stat. 160a.	no. Lim. " "	Cons. XV, 9.	1 acre.	no lim.	same	
Ky.	no. lim. no lim.	\$1000.	Gen. St. 81. ch 38. Art 3 § 9.	Same as country			
Ind.			Cons. I. 67. RS. 81. ch. 1. § 703.				\$600.
La.	Stat. 160a.		Cons. II. 14-21. Voor. St. 87. § 644.				\$2000
Me.	no lim. no. lim.	500.	RS. ch 81 § 63.	"	"	"	
Ma.	no lim. no. lim.	500. 100.	Cons. III 44. Cod. Pub. L 88. Art 83 § 8.	"	"	"	\$100.
Mich.	Cons. 40a. Stat. 40a.		Cons. XVI, 2. Now. St. 83 ch. 267 ‡	1 lot	\$1500.	same	
Minn.			Cons. I. 12. Gen. St. 83. ch. 68.	Not in city of 1 acre less than	\$5000. \$5000	"	
Miss.	Stat. 160a	\$2000.	Rev. Cod. 80 ch. 45 § 1248	no lim.	\$2000.	" § 1649	
Mo.	Stat. 160a	1500.	R. S. 89. ch 80 § 5435	Cities of 10000 pop. - 1899. 1051. § 3040. Cities of less pop. - 30391. 1051. § 15200.		"	

\* L 84-5 p 162; † L 91 p 303; ‡ L 93 p. 358.

## HOMESTEAD EXEMPTIONS--Continued.

States.	Country Property			City Property			Sua Property
	acres	value	references	Property	value	references	
Mont.	Stat. 100	\$2500.	Cons. XIX, 4. Sr. 87, Tir 8322	1/4 acre	\$2500		
Nebr.	Stat. 100	2000.	Sr 87 ch 86 § 1.	2 lots	2000		
Nev.	no lim.	5000.	Cons IV, 30. Gen St. 85 ch 4 § 559	same	as country		
N.H.	no lim.	500.	Gen St. 8 ch 138 § 1.	"	"	"	
N.J.	no lim.	1000.	Rev. [77, 1035 § 53]	"	"	"	
N.M.	no lim.	1000	[867, ch 37 § 13]	"	"	"	
N.Y.	no lim.	1000	RS ccd. pro. § 1397	"	"	"	
N.C.	no lim.	1000	Cons X, 2. Ccd 83, § 501.	1 ct	\$1000	same	
N.D.	Stat. 100	no lim.	Cons XVII, 208. Pl. Col. 83 ch 38 § 8	1 acre	no lim.	"	
O.	no lim.	\$1000.	RS 86 ch 11 § 5435	same	as country		
S.C.	no lim.	1000.	Cons I, 20. Gen St. 82 ch 71 §	"	"	"	
S.D.	Stat. 100	5000.	Cons XII, 4. Sr 83 C. Pro. § 32.3	1 acre	\$5000	same	
Tenn.	no lim.	1000	Cons II, 11. Ccd 84, § 2935	same	as country.		
Tex.	Cons 200	no lim	Cons XVI, 50	1 or more	\$5000	same	
	no lim	"	Civ. Ccd. 79 § 2336	lots	exclusive improvement	"	
Utah.	no lim	\$1000*	Sr 88, § 3429 § 11.	same	as country.		
Ver.	no lim.	500	RS 80, ch 9 § 1894	"	"	"	
Va.	no lim.	2000	Cons XI, 5. Ccd. 87, § 3630	"	"	"	
Wash.	no lim.	2000	Cons XIX, 1. [95 p 112]	"	"	"	
W. Va.	no lim.	1000	Cons XVI, 48	"	"	"	
	no lim.	1000.	Ccd. 87, ch 41 § 30	"	"	"	
Wis.	40 a	no lim	Cons I, 17. RS Sup 83 ch 180 § 2983	1/4 acre	no lim	same	
Wyo.	160 a	\$1500	Cons. XIX, 1. RS. 87 § 2780-6	1 or more lots.	\$1500	"	

\* \$2000 for debtor, \$500 for wife, \$250 for each other member of family.  
 a Subject to deaenold; § 296 p 1-3





## EXEMPTIONS FROM TAXATION.

## HOMESTEAD.

These are stated in order of amounts exempt. They are usually general exemptions under which the homestead may be exempt.

Mich.—The real and personal property of persons who by reason of poverty, in the opinion of the supervisor, are unable to contribute.

Fla.—Property of widows who have family to support and of persons disabled (\$200).

N. M.—Property of head of family not exceeding \$300.

Iowa—The first year of homestead on government land, also homestead of widows of ex-Federal soldiers (\$500).

Mass.—Property of widows and unmarried women above 21 years of age and of any person above 75 years; also minor whose father is dead (\$500); provided, the estate does not exceed \$1,000, exclusive of property otherwise exempt.

Conn.—Property of resident ex-soldiers; also widow of ex-soldier (\$1,000).

Idaho—Property of resident widows and orphans (\$1,000); provided that estate does not exceed \$5,000.

Mont.—Property of widows and orphans (\$1,000).

## GENERAL PERSONAL PROPERTY.

Beside the exemptions contained in the foregoing the following:

N. C., \$25; Ohio, \$50; Md. and Wyo., \$100; Kan., Mich. and S. D., \$200; Ore. and Wash.,<sup>1</sup> \$300; District of Columbia, \$500; Tenn., \$1,000.

## HOUSEHOLD FURNITURE.

Iowa, all family pictures and kitchen furniture, beds and bedding requisite for family; Utah, \$100; Ala., \$150; Idaho, Maine, \$200; Mich., Miss. and Wis., \$200 and family pictures; Mont. and Tex., \$250; Conn., La. and Vt., \$500; Mass., \$1,000.

## LIBRARIES.

Kan., \$50; Mich., \$150; Conn., \$200; Iowa and Utah, \$300; Ala., all of ministers' and all other than professional; Idaho, Miss., Mont., Vt. and Wis., all.

## MUSICAL INSTRUMENTS.

Maine, \$15; Conn., \$25; Mich., \$150.

<sup>1</sup> This was recently declared unconstitutional.

## PROVISIONS.

S. C., \$100; Wis., all necessary provisions and fuel for 6 months; Vt., all necessary for one year, together with hay and feed for stock during winter; Iowa, Ky., Md. and Miss., all on hand for family use; Ala., all on hand for family use and for making of crops; Conn., all fuel and provisions for family use.

## TOOLS.

Vt., 1 wagon, 1 sleigh and harness; Ala., 1 cart or wagon, all looms and spinning wheels for family use, \$25 of farming implements, \$25 of mechanics' tools, 1 sewing machine; Conn., \$200 farming or mechanics' tools and \$100 fishing apparatus; Idaho, \$200; Iowa, \$300; Mass., all farming, \$300 mechanics'; Maine and Vt., all necessary; Miss., all necessary for mechanic, all farming; Md. and Mont., all.

## APPAREL.

Ala., Conn., Iowa, Kan., Maine, Md., Mass., Mich., Miss., S. C., Utah, Vt., Wis., all.

## LIVE STOCK.

N. H., 2 hogs; Ky., \$50 and all poultry for use; Iowa, all animals not specified; Vt., all fowls, also sheep, cattle, horses and swine not over 4 months old; Maine and Mont., all stock under 6 months old; Mass., mules, horses, neat cattle, less than 1 year old, also swine and sheep less than 6 months; Ala., 2 cows and calves, 20 hogs, 10 sheep, all poultry; Conn., all young colts, calves and lambs, also swine \$150, and poultry \$25; Miss., all poultry, 2 cows and calves, 10 hogs, 10 sheep or goats, all colts under three years.

## CROPS.

Idaho, Mont., Wis. and Tenn., all growing crops; Maine, all hay, grain, potatoes, orchard products and wool on hand; Ala. and Ky., all agricultural products on hand; Conn. and Miss., all produce on hand grown or growing; Iowa, one year's crops and all wool shorn.

## MISCELLANEOUS.

Conn., \$100 cash; Ky., all articles manufactured in family for use; Md., all fish in possession of fisherman; Miss., all dogs, one gun; N. H. and Vt., 1 watch, 1 carriage; Tenn., all articles in the hands of the manufacturer.





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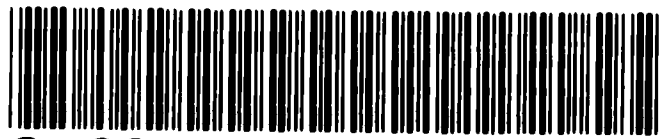
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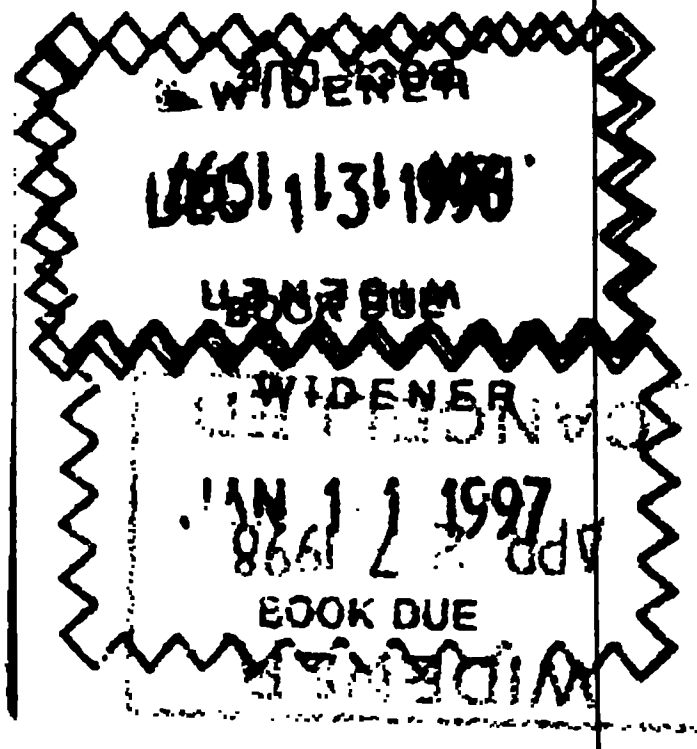
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**Personal Property Exemptions from Execution, etc.**

(Key: \* indicates an affirmation; † indicates "in all"; ‡ indicates "necessary"; mo. = months; mon. = monthly; yrs. = years; sp. = special; 3000 = \$3000; 1000 = \$1000; 500 = \$500; 200 = \$200; 100 = \$100; 50 = \$50; 30 = \$30; 15 = \$15; 10 = \$10; 5 = \$5; 3 = \$3; 1 = \$1; 1/2 = 1/2; 1/4 = 1/4; 1/8 = 1/8; 1/16 = 1/16; 1/32 = 1/32; 1/64 = 1/64; 1/128 = 1/128; 1/256 = 1/256; 1/512 = 1/512; 1/1024 = 1/1024; 1/2048 = 1/2048; 1/4096 = 1/4096; 1/8192 = 1/8192; 1/16384 = 1/16384; 1/32768 = 1/32768; 1/65536 = 1/65536; 1/131072 = 1/131072; 1/262144 = 1/262144; 1/524288 = 1/524288; 1/1048576 = 1/1048576; 1/2097152 = 1/2097152; 1/4194304 = 1/4194304; 1/8388608 = 1/8388608; 1/16777216 = 1/16777216; 1/33554432 = 1/33554432; 1/67108864 = 1/67108864; 1/134217728 = 1/134217728; 1/268435456 = 1/268435456; 1/536870912 = 1/536870912; 1/1073741824 = 1/1073741824; 1/2147483648 = 1/2147483648; 1/4294967296 = 1/4294967296; 1/8589934592 = 1/8589934592; 1/17179869184 = 1/17179869184; 1/34359738368 = 1/34359738368; 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